> Government and who required asylum and status in order that they might rebuild lives of self-dependence and dignity.[255]

The underlying assumption in the debate was therefore that the existence of sufficient national protection[256] was inconsistent with status as an internationally recognized refugee.

The primacy of domestic protection has been recognized in Canadian jurisprudence as well. In *Karnail Singh,*[257] the claim of a Sikh from the Punjab region of India was denied because of his admission that he could avoid police harassment by moving to a different region of the country. The Immigration Appeal Board enunciated the principle that "[i]f the applicant is able to live in security in some other area of his own country, he is not a refugee from that country."[258] In both *Jainarine Jerome Ramkissoon*[259] and *Bento Rodrigues da Silva,*[260] the Board applied the internal protection principle to situations where uncontrollable private violence was limited in scope to certain regions of the state of origin, with safety available elsewhere in the country.

The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can *genuinely access* domestic protection, and for whom the reality of protection is *meaningful.*[261] In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized.

[255] Statement of Mrs. Roosevelt of the U.S.A., 4 UNGAOR (264th plen. mtg.) at 473, December 2, 1949.

[256] Even the advocates of a more liberal refugee definition focused on the absence of *de facto* protection in the state of origin as a condition precedent to international protection. *See,* e.g., Draft Proposal for Article 1 submitted by the United Kingdom, U.N. Doc. E/AC.32/L.2, at 1, January 17, 1950.

[257] Immigration Appeal Board Decision M83-1189, C.L.I.C. Notes 62.4, November 14, 1983.

[258] *Id.*, at 3, *per* B. Howard.

[259] Immigration Appeal Board Decision T84-9057, June 21, 1984.

[260] Immigration Appeal Board Decision T86-9740, December 10, 1986.

[261] "The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so": UNHCR, *supra,* note 123, pp. 21-22.

5

Nexus to Civil or Political Status

Refugee law exists in order to interpose the protection of the international community in situations where resort to national protection is not possible. Because it is fundamentally a form of surrogate or substitute protection, the beneficiaries of refugee law have always been defined to exclude those who enjoy the basic entitlements of membership in a national community, and who ought reasonably to vindicate their basic human rights against their own state.[1] Refugees are unprotected persons, not just in the sense that their basic liberties or entitlements are in jeopardy, but more fundamentally because it is impossible for them to work within or even to restructure the national community of which they are nominally a part in order to exercise those human rights.[2] Their position within the home community is not just precarious; there is also an element of fundamental marginalization[3] which distinguishes them from other persons at risk of serious harm. As stated by Rogers Smith:[4]

> The refugee has been cast adrift, usually because his religion, ethnicity, economic aspirations, political beliefs or political alliances in some way stand opposed to his putative government's efforts to create and sustain a strong nation state.[5]

The early refugee accords did not articulate this notion of disfranchisement or breakdown of basic membership rights, since refugees were defined simply by specific national, political, and religious categories, including anti-Communist Russians, Turkish Armenians, Jews from Germany, and others.[6] The *de facto* uniting criterion, however, was the shared marginalization of

[1] "There must be a rupture of normalcy of relations between him and his state, which rupture must derive from events which are political in nature": B. Tsamenyi, "The 'Boat People': Are They Refugees?" (1983), 5 Human Rts. Q. 348, at 360.

[2] "The events which are the root-cause of a man's becoming a refugee derive from the relations between the State and its nationals": J. Vernant, *The Refugee in the Post-War World,* p. 5 (1953).

[3] P. Woodward, "Political Factors Contributing to the Generation of Refugees in the Horn of Africa" (1987), 9(2) Intl. Relations 111, at 112.

[4] R. Smith, "Refugees, immigrants and the claims of the nation-state", [1987] Times Literary Supplement 1422 (December 25-31, 1987).

[5] *Id.*

[6] *See* Chapter 1, *supra,* in particular at notes 18 and 21.

the groups in their states of origin, with consequent inability to vindicate their basic human rights at home. These early refugees were not merely suffering persons, but were moreover persons whose position was fundamentally at odds with the power structure in their home state. It was the lack of a meaningful stake in the governance of their own society which distinguished them from others, and which gave legitimacy to their desire to seek protection abroad.[7]

The modern refugee definition[8] gave voice to this premise by moving away from protection on the basis of named, marginalized groups, and toward a more generic formulation of the membership principle.[9] Given the prevailing primacy of the civil and political paradigm of human rights,[10] it was contextually logical that marginalization should be defined by reference to norms of non-discrimination: a refugee was defined as a person at risk of serious harm *for reasons of* race, religion, nationality, membership of a particular social group, or political opinion.[11] The rationale for this limitation was not that other persons were less at risk, but was rather that, at least in the context of the historical moment, persons affected by these forms of fundamental socio-political disfranchisement were less likely to be in a position to seek effective redress from within the state.[12]

Under the Convention, then, if the peril a claimant faces — however wrongful it may be — cannot somehow be linked to her socio-political situation

[7] The means of denying membership during the period 1920-1950 may be classified in terms of juridical, social, and individuated disfranchisement. *See* Chapter 1, *supra*, at notes 9-28.

[8] The 1951 Convention follows the model of a 1938 resolution of the Intergovernmental Committee for Refugees which moved away from a list of eligible categories to embrace "persons . . . who must emigrate on account of their political opinions, religious beliefs and racial origin": Resolution of the Committee, I.C.R. Doc., July 14, 1938.

[9] "[T]he history of the cognizable categories of persecution illustrates that they were intended to serve a liberal purpose, by creating a universally applicable and acceptable standard to replace ad hoc, situational responses to disparate refugee crises": D. Gagliardi, "The Inadequacy of Cognizable Grounds of Persecution as a Criterion for According Refugee Status" (1987-88), 24 Stanford J. Intl. L. 259, at 267-68. "The grounds of persecution set forth by the Convention are sufficiently broad so that the major grounds for discrimination or oppression have been included": A. Fragomen, "The Refugee: A Problem of Definition" (1970), 3 Case Western Reserve J. Intl. L. 45, at 54.

[10] "Americans were prominent among the architects and builders of international human rights, and American constitutionalism was a principal inspiration and model for them. As a result, most of the provisions of the Universal Declaration of Human Rights, and later of the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world": L. Henkin, "International Human Rights and Rights in the United States", in T. Meron, ed., *Human Rights in International Law: Legal and Policy Issues*, p. 39 (1984).

[11] *Convention relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force on April 22, 1954, at Art. 1(A)(2) ("*Convention*").

[12] L. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations: Its History and Work, 1946-1952*, pp. 47-48 (1956).

and resultant marginalization,[13] the claim to refugee status must fail. Put succinctly, refugee law requires that there be a nexus between who the claimant is or what she believes and the risk of serious harm in her home state.[14]

Critics of the membership principle argue that refugee law should embrace, for example, persons in flight from natural disaster, civil strife, war, or economic calamity simply as a response to their human misery.[15] It is suggested by some that refugee law is essentially coterminous with international human rights law, or even with humanitarianism, such that any person whose basic dignity is jeopardized should be entitled to seek protection abroad.[16] This generous perspective collides with the implicit assumption of conventional refugee law that unless excluded from the national community, one should vindicate claims to liberties and entitlements from within the state.[17] So long as the victims of a generalized disaster are not denied membership in the body politic, they are expected to work to address their needs through existing structures or by creating or rebuilding internal mechanisms for redress.

The dilemma, though, is that while the membership principle itself remains meaningful, its precise formulation in terms of civil or political status (race, religion, nationality, membership of a particular social group, or political opinion) may be unduly anchored in a particular era. These categories were seen by the drafters of the Convention as sufficiently inclusive to meet the claims of all known European refugees at the close of the Second World

[13] "It can hardly be expected for the applicant to specify the ground, as he may himself sometimes not be aware why he was subjected to persecution or threatened with persecutionary measures": P. Weis, "The concept of the refugee in international law" (1960), 87 J. du droit intl. 928, at 970.

[14] "All other reasons are irrelevant, unless used to augment a claim of persecution, or to show the circumstances that the alien would face at home": K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 724.

[15] The civil or political status criterion ". . . has created the greatest division and ferment, for there would seem to be little difference between suffering arising from one of those five sources and any other form of suffering. The results are the same; the human cost is incalculable. Nevertheless, the last requirement has been the sticking point in the debate over the adequacy of asylum law to protect victims of all types of calamities": M. Heyman, "Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife" (1987), 24 San Diego L.Rev. 449, at 453.

[16] "Precisely *why* an individual is persecuted is largely irrelevant — the *existence* of persecution is the only essential question. Because the definition of persecution is not dependent upon the enumeration of certain cognizable grounds, their presence within the definition of refugee is inappropriate. Their inclusion invites inquiry into factors that are tangential to the notion of persecution itself and the humanitarian purpose of providing relief to victims of persecution. The spirit of domestic and international refugee policy is lost in the shuffle": D. Gagliardi, *supra*, note 9, at 272.

[17] Rather than supplanting domestic responsibility for human rights, the purpose of the Refugee Convention was to assist only persons who "lacked the protection of a government": Statement of Mrs. Roosevelt of the U.S.A., 5 UNGAOR at 473, December 2, 1949.

War,[18] but are seen by some as inadequate to capture the spectrum of forms of disfranchisement in existence today.[19]

On the one hand, it remains strikingly true that racism, religious intolerance and other forms of socio-political disfranchisement continue to pose important barriers to national protection that refugee law can meaningfully address.[20] Developments since 1951, however, have suggested ways in which states might be inclined to expand the list of marginalizing phenomena. In particular, a clear majority of the nations in attendance at the abortive 1977 United Nations Conference on Territorial Asylum would have been prepared to recognize "foreign occupation or domination" as an additional valid ground for claiming refugee status.[21] At the regional level, the OAU Convention already recognizes claims grounded in "external aggression, occupation, foreign domination or events seriously disturbing public order",[22] and the Latin American Cartagena Declaration recommends status for persons in flight from "generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order".[23] There is a certain logical appeal in this

[18] "The United States delegation had said before, and must say again, that in its opinion all persons in need of protection at the present time were fully covered by the definition provided in article 1 of the draft Convention": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.166, at 14, August 22, 1950.

[19] "By singling out certain grounds for persecution, the refugee definition (at least a narrow reading of it) might well exclude persecution on other grounds, or persecution for no apparent reason at all": M. Gibney and M. Stohl, "Human Rights and U.S. Refugee Policy", in M. Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues*, p. 157 (1988). *Accord* D. Gagliardi, *supra*, note 9, at 281: "While tradition alone may be a substantial argument for maintaining cognizable categories of persecution, the problems of modern refugees frequently defy traditional analysis. The situations in El Salvador and Haiti illustrate the point. In the early part of the twentieth century, concepts of race, religion or political belief may have been sufficient to distinguish persons genuinely deserving of asylum from displaced persons, or from economic migrants seeking a more comfortable existence. However, these categories are hopelessly inadequate for the protection of persons fleeing random oppression and violence perpetrated by governments upon their populations".

[20] "Communal violence is one of the most frightening forms of conflict. When the members of one ethnic, religious or linguistic group clash with the neighbouring members of another, atrocities are almost inevitable. Even when governments do not have discriminatory policies, their inability to protect their own minorities or a threatened social group can indirectly cause the flight of large numbers of people": Independent Commission on International Humanitarian Issues, *Winning the Human Race?*, p. 98 (1988).

[21] Other amendments agreed to were essentially clarifications of the existing five grounds, e.g., specific mention of struggles against colonialism, apartheid, and racism (forms of political opinion); reference to colour, national origin, and ethnic origin (variants of race and nationality); and family status (arguably within the scope of a particular social group). *See* F. Leduc, "L'Asile territorial et la Conférence des Nations Unies de Genève, Janvier 1977" (1977), 23 Ann. française de droit intl. 221, at 247-48.

[22] Organization of African Unity, *Convention governing the specific aspects of refugee problems in Africa*, U.N.T.S. 14,691, entered into force June 20, 1974, at Art. I(2). *See generally* Section 1.4.3, *supra*.

[23] *Declaracion de Cartagena*, Doc. OEA/Ser.L/II.66, doc. 10, rev. 1, at Conclusion 3. *See generally* Section 1.4.4, *supra*.

type of evolution, since these phenomena may result in fundamental marginalization as effectively as civil or political discrimination. The grounding of refugee claims in the existence of violence or occupation would continue the Convention's focus on factors which undermine the political relationship between citizen and state, and is in that sense qualitatively distinct from proposals (never adopted at either the universal or regional level) to grant refugee status to the victims of natural disaster or economic hardship.[24]

Even though conceptually logical, this kind of liberalization of the Convention's grounds of claim is unlikely to receive universal support because of its practical implications. Whereas reliance on the demonstration of civil or political discrimination normally presupposes that only a minority of the population of any state can access refugee status, a move toward recognition of claims based on generalized oppression *per se* would have the effect (at least in theory) of putting whole populations in the position of claiming refugee status. This would seem to be quite fundamentally at odds with both the fairly narrow conceptualization of the drafters of the Convention[25] and the trend to restrictionism in northern countries.[26]

In Canada, the Convention-based list of civil and political grounds for refugee status ". . . is exhaustive and must be applied strictly and objectively".[27] Since persons who may have good reason to fear persecution for some other reason are thus excluded,[28] the link between fear of persecution and civil or political status needs to be clearly established.[29]

[24] "This condition excludes victims of natural disasters from the definition of the refugee known to international law; to put it more precisely, the events which are the root-cause of a man's becoming a refugee are always of a political nature": J. Vernant, *The Refugee in the Post-War World*, p. 5 (1953).

[25] "In the light of the nature of the draft Convention, it was probable that if a global definition were adopted some countries might be reluctant to adhere to this Convention; there were persons who might be considered as refugees, for example those fleeing from a revolution, for whom countries might not wish to provide a blank cheque of protection in advance; there were also other persons, admittedly refugees, in respect of whom the question would arise as to whether or not they should enjoy, or needed, the protection of an international convention": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.158, at 14, August 15, 1950.

[26] "[M]any states in the developed world are now expressing alarm at the number of people arriving at their borders, seeking refuge from intolerable conditions in their own country. Their tradition of offering asylum as a positive act of state policy and international solidarity is coming under mounting pressure. The steady process of expressing this solidarity through formal legal instruments has been halted, and is in danger of being reversed": Independent Commission on International Humanitarian Issues, *Refugees: Dynamics of Displacement,* pp. 31-32 (1986).

[27] *Marc Georges Sévère* (1974), 9 I.A.C. 42, at 47, *per* J.-P. Houle.

[28] "The already liberal interpretation of the Geneva Convention Relating to the Status of Refugees is not, however, sufficiently flexible to apply to all persons who, for good reason, run the risk of imprisonment": *Antonio Correia*, Immigration Appeal Board Decision 75-10245, April 5, 1976, at 2, *per* G. Legare. This decision, however, may exemplify an unwarranted strictness of interpretation of the notion of civil or political status, as the claim of a former member of the Portuguese internal security service was denied in relation to both membership of a particular social group and political opinion.

[29] "These grounds must relate directly to the appellant, upon whom the burden of proof falls":

Essentially, Canadian law prescribes a "but for" test: Would the claimant be similarly at risk of serious harm but for her civil or political status? First, there must be some causal connection between civil or political status and risk.[30] Where an applicant belongs to a minority group, but there is no demonstrable nexus between that fact and her fear of persecution, the claim cannot succeed. Thus, applications have been dismissed where the denial of employment was the result of incapacity rather than coincidental adverse political opinion;[31] where the claimant's religion could not be related to his fear of assault;[32] and where detention occurred at a time when the state could not have known of the applicant's ideology.[33]

On the other hand, it is not required that the totality of the risk faced by the claimant be specific to persons of her civil or political status. As discussed in Chapter 3, persons already at generalized risk may nonetheless succeed on a claim to refugee status if some element of differential intent or impact based on civil or political status is demonstrated.[34] The landmark decision of the Federal Court in *Zahirdeen Rajudeen*[35] rejected the Immigration Appeal Board's finding that the Sri Lankan claimant was not a refugee because the harassment he faced was simply the product of generalized civil unrest.[36] While acknowledging the context of generalized violence, the Federal Court nonetheless found for the claimant because he faced a heightened risk as a result of being both Tamil and a Muslim. The "but for" test thus requires only that the particular level of jeopardy faced by the applicant be linked to civil or political status, not that the whole of the risk be uniquely associated with that status.

The particular historical context which led to the linkage between refugeehood and civil or political status notwithstanding, the analysis which follows will show that it is largely possible for a liberal interpretation of the five enumerated grounds to sustain the Convention's vitality.[37] By contouring the bases for claim so as to identify instances of fundamental disfranchisement in which deference to national remedies for human rights violations is not viable, refugee law can remain meaningful to the modern victims of socio-political marginalization.[38]

Manuel Jesus Torres Reyes, Immigration Appeal Board Decision 75-1063, October 23, 1975, at 6, *per* R. Tremblay; set aside on other grounds by the Federal Court of Appeal on October 28, 1976; claim ultimately rejected by the Immigration Appeal Board on December 20, 1976.

[30] The recent decision of the Federal Court of Appeal in *Attorney General of Canada v. Patrick Francis Ward* underscores the importance of a linkage between fear of persecution and the enumerated grounds in the Convention: Federal Court of Appeal Decision A-1190-88, at 15, *per* Urie J.; leave to appeal granted by the Supreme Court of Canada on November 8, 1990: Supreme Court Bulletin 2347.

[31] *Fernando Alfonso Naredo Arduengo*, Immigration Appeal Board Decision T80-9159, C.L.I.C. Notes 27.13, November 20, 1980, at 3; set aside on other grounds by the Federal Court of Appeal at (1981) 130 D.L.R. (3d) 752, December 18, 1981; claim ultimately rejected by the Immigration Appeal Board on April 15, 1985.

[32] *Dionisio Nunes Esteves*, Immigration Appeal Board Decision T87-9304X, September 15, 1987.

[33] *Ajit Singh*, Immigration Appeal Board Decision T83-9208, October 15, 1987, at 3.

[34] *See* text *supra* at Section 3.2.5, especially at note 175 ff.

[35] *Rajudeen v. Minister of Employment and Immigration* (1985), 55 N.R. 129 (F.C.A.).

[36] Immigration Appeal Board Decision V83-6091, C.L.I.C. Notes 57.10, July 20, 1983, at 4.

[37] "[T]hese criteria of grounds for persecution were drafted with special reference to the situation created by the Second World War, but have, however, been found acceptable also in our times. . .": I. Foighel, "Legal Status of the Boat People" (1979), 48 Nordisk Tidsskrift for Intl. Ret. 217, at 222.

[38] "Although the Convention seems to limit considerably the scope of refugees by enumerating five factors for their persecution, in fact it establishes rather broad categories": Y. Shimada, "The Concept of the Political Refugee in International Law" (1975), 19 Japanese Ann. Intl. L. 24, at 33.

5.1 Race

The first form of disfranchisement within the scope of refugee law is that based on race. While the drafters of the Convention did not specifically define the term, the historical context makes clear that their intent was to include those Jewish victims of Naziism who had been persecuted because of their ethnicity, whether or not they actively practised their religion.[39] This historical rationale is important, because it legitimizes the attribution of a broad social meaning to the term "race" which includes all persons of identifiable ethnicity.[40] As Atle Grahl-Madsen has observed, the Convention's notion of race includes not only persons at risk by reason of their membership in a particular scientific category, but also other groups such as Jews and Gypsies whose physical or cultural distinctiveness has caused them to suffer social prejudice.[41] The possibility of overlap between race and other enumerated factors such as religion, nationality, and membership of a particular social group is thus clear, but presents no real problem since claims may be based on one or a combination of forms of civil or political disfranchisement.[42]

[39] Grahl-Madsen suggests that the reference to "race" is derived from SHAEF Administrative Memorandum Number 39 which was "aimed at helping the Jewish victims of Nazi persecution, of whom some were persecuted because of their Jewish race, some because of their Jewish religion, and some for both reasons": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, pp. 217-18 (1966). *Accord* P. Hyndman, "The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Sri Lankan Tamil Applicants" (1987), 9 Human Rts. Q. 49, at 69.

[40] "[E]thnicity is probably the background of the more dubious term 'race'": I. Foighel, *supra*, note 37, at 222.

[41] "The origin of the phrase makes it quite clear that the word 'race' in the present context denotes not only the major ethnic groups, such as Europeans ('the white race'), Africans ('the black race'), Mongols ('the yellow race'), Red Indians, etc., but also groups which are less easily differentiated, such as Jews, gipsies [sic], etc. In the present context the word 'race' is therefore referring to social prejudice rather than to a more or less scientific division of mankind. In other words, the term 'race', as used in Article IA(2), is a social more than an ethnographic concept, and is applicable whenever a person is persecuted because of his ethnic origin": A. Grahl-Madsen, *supra*, note 39, p. 218.

[42] "It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail": United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, p. 17 (1979).

A broad interpretation of race is not only historically defensible, but is moreover consistent with modern international usage.[43] The widely accepted International Convention on the Elimination of All Forms of Racial Discrimination,[44] for example, defines "racial discrimination" as including differential treatment based on "race, colour, descent, or national or ethnic origin".[45] In the refugee context, the clear majority of delegates to the Conference on Territorial Asylum similarly agreed to extend protection to persons persecuted for reasons of "race, colour, national or ethnic origin".[46] The Executive Committee of the UNHCR adopted this perspective, and has recommended a comprehensive definition of race to states:

> Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently, it will entail membership of a specific social group of common descent forming a minority within a larger population.[47]

This UNHCR-derived interpretation has been explicitly adopted into Canadian law in a series of decisions commencing with *Boleslaw Dytlow,*[48] as well as in immigration policy guidelines.[49] The relevant case law has equated race with "ethnic background",[50] "heritage",[51] and "distinct minority" status.[52]

[43] "Given legal developments affecting this topic over the last thirty years, the broad meaning can be considered valid also for the purposes of the 1951 Convention": G. Goodwin-Gill, *The Refugee in International Law,* p. 27 (1983). Among those Goodwin-Gill considered as within this broad meaning are Asian Ugandans, the Hutu from Burundi, ethnic Chinese from Vietnam, and blacks from South Africa.

[44] G.A. Res. 2106 A (XX), December 21, 1965, entered into force January 4, 1969. This Convention has been adhered to by 127 states, including Canada: J.-B. Marie, "International Instruments Relating to Human Rights: Classification and Chart Showing Ratifications as of 1 January, 1989" (1989), 10 Human Rts. L.J. 103.

[45] *Id.*, at Art. 1(1).

[46] U.N. Doc. A/CONF.78/12, at Art. 2(1)(a). This amendment was co-sponsored by Algeria, Egypt, Iraq, Jordan, Kuwait, Libya, Morocco, Saudi Arabia, Somalia, Syria, and Yemen, and was adopted by a vote of 50 in favour, 19 opposed, and 12 abstaining: F. Leduc, "L'Asile territorial et la Conférence des Nations Unies de Genève, Janvier 1977" (1977), 23 Ann. française de droit intl. 221, at 248.

[47] UNHCR, *supra*, note 42, p. 18.

[48] Immigration Appeal Board Decision V87-6040X, July 7, 1987, at 1-2, *per* A. Wlodyka; affirmed without comment by Federal Court of Appeal Decision A-569-87, April 13, 1988. *See also Sylvia and Patrycya Dytlow*, Immigration Appeal Board Decision V87-6361X, October 29, 1987; *Stanislaw Dytlow and Krystyna Pawlowksa,* Immigration Appeal Board Decision V86-6268/6270, December 28, 1988.

[49] Race is said to denote "not only major ethnic groups such as black, white, European, African, etc., but also embraces the social concept e.g. Jews, Gypsies, a particular tribe or minority, racial or ethnic": Canada Employment and Immigration Commission, *Immigration Manual*, at I.S. 13.07(1)(a)(i), June 1990.

[50] *Pierre Katanku Tshiabu Tshibola*, Immigration Appeal Board Decision M84-1074, May 30, 1985, at 4, *per* P. Davey.

[51] *Ganganee Janet Permanand,* Immigration Appeal Board Decision T87-10167, August 10, 1987, at 1, *per* P. Ariemma.

[52] *Boleslaw Dytlow*, Immigration Appeal Board Decision V87-6040X, July 7, 1987, at 2, *per* A. Wlodyka.

Among those whose claims have been dealt with on the basis of race are Ibos from Nigeria,[53] the Mohajirs of Pakistan,[54] the Baganda from Uganda,[55] Guyanese of East Indian descent,[56] Tamils from Sri Lanka,[57] the Baluba from Zaire,[58] and Gypsies of Polish origin.[59] The primary notion which unites these groups is their exclusion from state protection based on identifiable ethnicity.

The equation of race with minority status must be viewed in the context of effective political power, not just numbers. Since refugee law is concerned with the absence of protection rather than with minority status *per se*, the members of a country's ethnic majority may be protected as racially defined refugees if they are disfranchised in terms of respect for core human rights. In *Pierre Katanku Tshiabu Tshibola,*[60] for example, the Immigration Appeal Board accepted the claim of a Baluba from Zaire. It noted that while the Baluba constitute half the population of that state, the Ngwandi ethnic group holds effective power, thereby creating a risk of oppression for the Baluba. Similarly, in the case of *Ganganee Janet Permanand*[61] the Board observed:

> The Indo-Guyanese community to which the claimant belongs is the largest in number in Guyana. The numerical majority, of course, does not necessarily guarantee immunity from persecution by a minority holding the power of the State.[62]

One can similarly imagine the extension of this principle to blacks in South Africa,[63] and to other ethnic groups denied effective political voice within their country of origin. Majority status alone does not negate a claim to racially defined refugee status if discernible ethnicity gives rise to a genuine risk of serious harm not remediable by national protection.

[53] *Jones Adeniji Adetuyi*, Immigration Appeal Board Decision 79-9057, March 5, 1979.

[54] *Owais Uddin Ahmad*, Immigration Appeal Board Decision 79-1197, November 21, 1979.

[55] *Joseph Maria Mpagi*, Immigration Appeal Board Decision V80-6254, August 13, 1980.

[56] *Benaiserie Mangra*, Immigration Appeal Board Decision T83-10491, January 5, 1984; *Oumar Baksh*, Immigration Appeal Board Decision T83-10588, January 18, 1984; *Jainarine Jerome Ramkissoon,* Immigration Appeal Board Decision T84-9057, June 21, 1984; *Ganganee Janet Permanand,* Immigration Appeal Board Decision T87-10167, August 10, 1987.

[57] *Krishnapillai Easwaramoorthy,* Immigration Appeal Board Decision T82-9736, June 18, 1984. *Accord* P. Hyndman, *supra*, note 39, at 69.

[58] *Pierre Katanku Tshiabu Tshibola*, Immigration Appeal Board Decision M84-1074, May 30, 1985.

[59] *Boleslaw Dytlow*, Immigration Appeal Board Decision V87-6040X, July 7, 1987, affirmed without comment in Federal Court of Appeal Decision A-569-87, April 13, 1988; *Sylvia and Patrycya Dytlow*, Immigration Appeal Board Decision V87-6361X, October 29, 1987; *Robert Dytlow*, Immigration Appeal Board Decision V87-6521X, January 5, 1988; *Stanislaw Dytlow and Krystyna Pawlowska,* Immigration Appeal Board Decision V86-6268/6270, December 28, 1988.

[60] Immigration Appeal Board Decision M84-1074, May 30, 1985.

[61] Immigration Appeal Board Decision T87-10167, August 10, 1987.

[62] *Id.*, at 7, *per* P. Ariemma.

[63] Z. Rizvi, "Causes of the Refugee Problem and the International Response", in A. Nash, ed., *Human Rights and the Protection of Refugees under International Law*, p. 111 (1988).

5.2 Nationality

Closely linked to the notion of race or ethnicity is the concept of nationality. As in the case of race, the drafting history of the Convention offers no specific definition of nationality.[64] The early commentators assumed a narrow meaning of the term, roughly equivalent to formal citizenship, leading to the obvious question of why a state would choose to persecute its own citizens merely by reason of their status as citizens.[65] A slightly more expansive interpretation of citizenship, however, suggests a number of situations in which disfranchisement on the basis of formal political status is conceivable.

First, resident internationally unprotected persons, such as refugees and stateless persons,[66] might be the objects of human rights abuse by reason of their status as "foreigners". While inhabitants who retain the formal and effective citizenship of another state could not advance a claim to refugee status in relation to the state of domicile,[67] those who cannot enjoy meaningful protection elsewhere are properly assessed as refugees in accordance with the concept of state of former habitual residence.[68] Second, persons who are denied full citizenship in their own state (such as Palestinians in Israel) could qualify as nationally defined refugees insofar as their inferior political status can be shown to put them at risk of persecution. Third, some states may disfranchise a portion of their population by ascribing a different nationality to them (as in the case of the black "homelands" in South Africa), and establishing regimes which fail to guarantee basic human rights to those assigned the new "nationality". Fourth, persecution based on nationality might arise in the context of a state composed of previously sovereign territories (such as the U.S.S.R.), where measures are directed against those who define their nationality in terms of allegiance to the predecessor state.

In addition to notions of formal nationality, it is generally suggested that nationality encompasses linguistic groups and other culturally defined

[64] N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation*, p. 53 (1953).

[65] *Id. Accord* C. Pompe, "The Convention of 28 July 1951 and the International Protection of Refugees", [1956] Rechtsgeleerd Magazyn Themis 425, published in English as U.N. Doc. HCR/INF/42, May 1958, at 9: "How persecution on grounds of nationality comes in is not quite clear, as the refugee either possesses (or did possess) the nationality of the country in which he fears persecution, or was settled there as a stateless person."

[66] "Persecution for 'reasons of nationality' is also understood to include persecution for lack of nationality, that is: persecution of stateless persons": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 219 (1966).

[67] Such persons would not have a well-founded fear of persecution in relation to their country of nationality, and would therefore fail to meet the alienage requirements of the Convention definition. *See* Section 2.4, *supra*.

[68] *See* Section 2.5.2, *supra*. *Accord* G. Goodwin-Gill, *The Refugee in International Law*, p. 29 (1983).

collectivities,[69] thus overlapping to a significant extent with the concept of race.[70] Because many such groups share a sense of political community distinct from that of the nation state, their claims to refugee protection may reasonably be determined on the basis of nationality as well as on race.

5.3 Religion

Religion as defined in international law[71] consists of two elements. First, individuals have the right to hold or not to hold[72] any form of theistic, nontheistic, or atheistic belief.[73] This decision is entirely personal: neither the state nor its official or unofficial agents may interfere with an individual's right to adhere to or to refuse a belief system,[74] nor with a decision to change one's beliefs.[75] Second, an individual's right to religion implies the ability to live in accordance with a chosen belief, including participation in or absten-

[69] "The term 'nationality' in this context is not to be understood only as 'citizenship.' It refers also to membership of an ethnic or linguistic group. . .": UNHCR, *supra*, note 42, p. 18. *Accord* A. Grahl-Madsen, *supra*, note 66, p. 218; G. Goodwin-Gill, *supra*, note 68, p. 29; B. Tsamenyi, "The 'Boat People': Are They Refugees?" (1983), 5 Human Rts. Q. 348, at 366; C. Wydrzynski, *Canadian Immigration Law and Procedure*, p. 327 (1983).

[70] "The term 'nationality' generally receives a broad interpretation and can overlap with some of the other grounds. It is usually taken to include, as well as citizenship, members of specific ethnic or linguistic groups and may occasionally overlap with the term 'race'": P. Hyndman, "The 1951 Convention Definition of Refugee" (1987), 9 Human Rts. Q. 49, at 70. *Accord* UNHCR, *supra*, note 42, p. 18.

[71] *See* in particular *Universal Declaration of Human Rights*, U.N.G.A. Res. 217A (III), December 10, 1948 (*"UHDR"*), at Art. 18; *International Covenant on Civil and Political Rights*, U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force March 23, 1976 (*"ICCPR"*), at Art. 18; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N.G.A. Res. 36/55, November 25, 1981 (*"Declaration"*).

[72] The resurgence of religious fundamentalism in many parts of the world will undoubtedly give rise to refugee claims grounded in reprisals for failure to adopt the official ideology. *See* Z. Rizvi, *supra*, note 63, p. 111.

[73] *Draft International Convention on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, U.N. Doc. E/1980/13 (*"Draft Convention"*), at Art. I(a). This draft convention received overwhelming support in the United Nations Commission on Human Rights, but has not been adopted.

[74] "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice": ICCPR, *supra*, note 71, at Art. 18(2). *Accord* Declaration, *supra*, note 71, at Art. I(2). In contrast, some Canadian decisions have held that the application of official pressure to renounce a religion is not sufficient to constitute a claim to refugee status: *Lech Jankowski*, Immigration Appeal Board Decision V80-6410, C.L.I.C. Notes 26.11, January 5, 1981; *Radovan Sumera*, Immigration Appeal Board Decision V81-6161, May 28, 1981.

[75] Draft Convention, *supra*, note 73, at Art. III(a). The issue of apostasy was considered by the Immigration Appeal Board in the case of *Adel Mohammed Bakr Mohamed*, an Egyptian who had converted from Islam to Christianity. While evidence of genuine risk was found lacking in the particular circumstances, the Board appears to have accepted the principle that refugee protection could appropriately be extended to persons with an apprehension of persecution due to their decision to change religion: Immigration Appeal Board Decision V87-6168, November 18, 1988, at 3.

tion from formal worship and other religious acts, expression of views, and the ordering of personal behaviour.[76]

Because religion encompasses both the beliefs that one may choose to hold and behaviour which stems from those beliefs, religion as a ground for refugee status similarly includes two dimensions.[77] First is the protection of persons who are in serious jeopardy because they are identified as adherents of a particular religion.[78] It is not necessary that a claimant have taken any kind of active role in the promotion of her beliefs, nor even that she be particularly observant of its precepts or rituals. In the case of *Francisco Jorge Carvalho Penha*,[79] for example, the Immigration Appeal Board remarked that "[t]he fact that [the claimant] had not received baptism does not detract from the . . . claim since he was perceived by members of his community as being a Jehovah's Witness."[80] This decision contrasts favourably with other cases in which protection on the ground of religion was limited to objectively defined religious practitioners.[81] The central issue must be whether there is a linkage between the threat of persecution and the claimant's self-defined or externally ascribed religious beliefs, in which case refugee protection is warranted.

Alternatively, because religion includes also behaviour which flows from belief, it is appropriate to recognize as refugees persons at risk for choosing to live their convictions. This proposition is constrained only by the limitation expressed in the International Covenant on Civil and Political Rights:

[76] The Universal Declaration refers to the right "either alone or in community with others and in public or private, to manifest [one's] religion or belief in teaching, practice, worship and observance": UDHR, *supra*, note 71, at Art. 18. *Accord* ICCPR, *supra*, note 71, at Art. 18. The Declaration elaborates this notion to include the right of parents to determine their children's moral education, and the freedoms to maintain and assemble in places of worship, to establish charitable and humanitarian institutions, to acquire and use religious articles and materials, to write and disseminate religious information, to teach religion, to solicit funds, to establish a religious leadership, to observe holidays and ceremonies, and to communicate with others at the national and international levels on matters of religion: Declaration, *supra*, note 71, at Arts. 5 and 6.

[77] *See* A. Grahl-Madsen, *supra*, note 66, p. 218; and G. Goodwin-Gill, *supra*, note 68, pp. 27-28.

[78] For example, "[t]he present century has . . . seen large-scale persecution of Jews under the hegemony of Nazi and Axis powers up to 1945, while more recent targets have included Jehovah's Witnesses in Africa, Moslems in Burma, Baha'is in Iran and believers of all persuasions in totalitarian and self-proclaimed atheist states": G. Goodwin-Gill, *supra*, note 68, pp. 27-28.

[79] Immigration Appeal Board Decision T87-9305X, December 16, 1987.

[80] *Id.*, at 2, *per* P. Ariemma.

[81] *See*, e.g., *Joseph Maria Mpagi*, Immigration Appeal Board Decision V80-6254, August 13, 1980, in which nominal membership in the Roman Catholic Church was adjudged insufficient to bring the claim within the scope of the Convention. *Accord Tadeusz Adamusik*, Immigration Appeal Board Decision 75-10405, January 15, 1976; affirmed on other grounds by the Federal Court of Appeal at (1976), 12 N.R. 262; *Teresa Augustyn*, Immigration Appeal Board Decision T81-9103, March 18, 1981; *Leczek Franciszek Bala*, Immigration Appeal Board Decision V81-6136, May 11, 1981.

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[82]

While the scope of this restriction is arguably broad, the assertion in one Board decision that "[g]iven the applicant's religious attitude . . . one might reasonably expect that he will 'keep his mouth shut' "[83] is simply wrong. The peaceful expression of one's beliefs, including engaging in worship,[84] playing an active role in religious affairs,[85] and proselytizing[86] may give rise to a genuine need for protection. Religious behaviour includes more than just formal acts of worship, and may encompass, for example, conscientious objection to military service.[87]

In its decision in *Bento Rodrigues da Silva*,[88] the Immigration Appeal Board developed the unhelpful notion that a religiously defined claim is to be dismissed if the applicant is not prevented from practising her religion. This principle has been taken to mean that the form of harm feared in religiously grounded cases must be specifically religious.[89] *Boota Bilaspuri Singh*,[90] for example, involved the claim of a Sikh preacher whose frequent addresses on Indian radio and television dealt with the political implications of his religious beliefs. He was arrested, detained, and ordered to refrain from "preaching on controversial topics".[91] Without even considering whether the claimant's arrest, detention, and denial of free speech (all arguably in con-

[82] ICCPR, *supra*, note 71, at Art. 18(3).

[83] *Orhan Demir*, Immigration Appeal Board Decision M82-1274, January 6, 1983, at 4, *per* J.-P. Houle.

[84] *Teresa Augustyn*, Immigration Appeal Board Decision T81-9103, March 18, 1981; *Leczek Franciszek Bala*, Immigration Appeal Board Decision V81-6136, May 11, 1981; *Radovan Sumera*, Immigration Appeal Board Decision V81-6161, May 28, 1981; *Mikieal L. Dankha*, Immigration Appeal Board Decision V82-6160, C.L.I.C. Notes 46.10, August 12, 1982; *Bento Rodrigues da Silva*, Immigration Appeal Board Decision T86-9740, December 10, 1986; *Joao Machado da Silva*, Immigration Appeal Board Decision T87-9612X, October 5, 1987.

[85] *Joseph Maria Mpagi*, Immigration Appeal Board Decision V80-6254, August 13, 1980; *Mikieal K. Dankha*, Immigration Appeal Board Decision V82-6160, C.L.I.C. Notes 46.10, August 12, 1982.

[86] *Orhan Demir*, Immigration Appeal Board Decision M82-1274, January 6, 1983, at 3. *But see Panagiotis Billias*, Immigration Appeal Board Decision 79-1166, C.L.I.C. Notes 27.10, July 7, 1980.

[87] In the case of a Salvadoran draft evader, "the Board [found] a systematic persecution by reason of religion. It is the failure of the recruiting system to make allowances for the convictions of the conscientious objector that forms the basis of the fear. Such a failure amounts to fear of persecution within the meaning of the Act": *Luis Alberto Mena Ramirez*, Immigration Appeal Board Decision V86-6161, May 5, 1987, at 5, *per* D. Anderson. *Accord Theodosios Drouskas*, Immigration Appeal Board Decision 79-1055, C.L.I.C. Notes 11.18, October 11, 1979, at 6. *See* discussion of draft evasion and desertion *infra* at Section 5.7.

[88] Immigration Appeal Board Decision T86-9740, December 10, 1986.

[89] *See*, e.g., *Jiwan Kaur Kang*, Immigration Appeal Board Decision V86-6183, April 13, 1987; *Kinder Sangha Singh*, Immigration Appeal Board Decision V87-6263X, September 23, 1987.

[90] Immigration Appeal Board Decision V87-6150X, May 19, 1987.

[91] *Id.*, at 3.

travention of international human rights law[92]) were sufficiently serious to constitute persecution, the Board concluded that

> Although Mr. Bilaspuri was prevented on several occasions from speaking on political topics, there was no evidence led which would indicate that he was prevented from practicing his religion. In the case of *da Silva*, the Board concluded that where there [is] no evidence that the claimant [is] precluded from practicing his faith, he [is] unable to establish a well-founded fear of persecution by reason of his religion.[93]

This assumption that only specifically religious forms of persecution are relevant in religiously based claims is misguided, since our concern is to identify situations where there is a genuine risk of any kind of serious harm consequent upon a choice or exercise of one's belief system. In some circumstances, the serious harm may indeed consist of the suppression of the right to religious choice or expression, clearly within the scope of persecution.[94] Indeed, as the Board noted in *Tomasz Gozdalski,*[95] indirect prevention of religious practice is sufficient to establish a claim to refugee status:

> Mr. Gozdalski is a devout Catholic, citizen of an atheist country, Poland. The State, however, tolerates the practice of religion officially, but it seems that very often the army or the corporations (which are all state owned) schedule *compulsory* meetings for communist propaganda on Sunday morning, when a good Catholic would attend mass, thus a disguised way of preventing freedom of religion. For a deeply religious person, this could amount to persecution.[96]

Alternatively, however, a claim is also established where an individual is allowed to adopt or exercise a belief system, but other serious human rights consequences flow from such a decision or action. For example, in *Abdul Rashid*[97] the Immigration Appeal Board looked to evidence of the socio-economic victimization of the Ahmadi claimant to substantiate his claim to refugee status, and in *Jorge Marcal Baltazar*[98] the Board was willing to consider evidence of religiously inspired interference with the claimant's livelihood. Any form of anticipated harm within the scope of persecution[99] suffices, so long as it is linked to a decision to hold or exercise a particular form of belief.

[92] *See* Section 4.4, *supra.*

[93] *Supra*, note 90, at 6, *per* J. MacLeod.

[94] *Boguslaw Buk*, Immigration Appeal Board Decision V80-6188, June 12, 1980; *Darshan Singh*, Immigration Appeal Board Decision T84-9443, October 3, 1984; *Rajmati Singh*, Immigration Appeal Board Decision T84-9608, November 15, 1984.

[95] Immigration Appeal Board Decision M87-1027X, April 23, 1987.

[96] *Id.*, at 1, *per* M. Durand. *But see Jan Waclaw Zariczniak,* Immigration Appeal Board Decision T81-9160, C.L.I.C. Notes 31.11, April 24, 1981.

[97] Immigration Appeal Board Decision M87-1023X, April 16, 1987.

[98] Immigration Appeal Board Decision T87-9226X, October 1, 1987.

[99] *See* Chapter 4, *supra.*

5.4 Political Opinion

The notion of persecution on account of political opinion was conceived in liberal terms. The Convention's drafters noted that in addition to "diplomats thrown out of office" and persons "whose political party had been outlawed", even "individuals who fled from revolutions" ought to be encompassed by the political opinion category.[100] That is, protection on the ground of political opinion was to be extended not only to those with identifiable political affiliations or roles, but also to other persons at risk from political forces within their home community. Contemporary Canadian jurisprudence mirrors this historical conceptualization in most respects.

5.4.1 Unexpressed Political Opinion

Because the Convention definition refers to "political opinion" rather than to the arguably more constrained notion of "political activity", there is no requirement that a claimant have acted upon her beliefs prior to departure from her country in order to qualify for refugee status.[101] As stated in the landmark decision of *Juan Alejandro Araya Heredio:*[102]

> . . . the Convention speaks not of political activities but of political opinions. Opinions are often, but not necessarily, expressed in action, and history has taught us that some political regimes. . . persist in pursuing some of their nationals simply because the latter supported a former regime or collaborated with it, or simply because they oppose or, owing to their former loyalties, constitute a challenge to the authority now in power.[103]

In some circumstances, the expression of a non-conforming political belief while in the home state may simply have been a practical impossibility,[104] while in other cases the applicant may not have held or felt as strongly about the particular belief at the time of departure.[105] Because the refugee defini-

[100] U.N. Doc. E/AC.7/SR.172, August 12, 1950, at 18-23, and U.N. Doc. E/AC.7/SR.173, August 12, 1950, at 5.

[101] "A person is a political refugee if he has a well-founded fear based on political opinion. He need not have a well-founded fear based on political activity": Minister of Employment and Immigration, "New Refugee Status Advisory Committee Guidelines on Refugee Definition and Assessment of Credibility", at Rule 11 (1982).

[102] Immigration Appeal Board Decision 76-1127, January 6, 1977. *Accord.*, e.g., *Akrimul Huque Chowdhury v. Deputy Attorney General of Canada*, Federal Court of Appeal Decision A-468-87, May 12, 1988, at 2, *per* MacGuigan J.: "[T]he definition of Convention Refugee in the Act refers not to 'political activities' but to 'political opinion'. . . ."

[103] *Id.*, at 7, *per* J.-P. Houle.

[104] "Because the applicants are fleeing from totalitarian states in which there are limited opportunities for political expression and great risks accompanying political dissent, it seems unreasonable for the Board to equate political motivation with political activism": D. Roth, "The Right of Asylum Under United States Immigration Law" (1981), 33 U. Florida L.Rev. 539, at 551.

[105] "[T]he fear of bad-faith claims does not justify an inflexible rule. . . many of these asylum applicants are students, who may never before have had the opportunity or the critical ability to compare political conditions in their homeland with those in other countries": D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L.Rev. 1125, at 1142.

tion requires a forward-looking assessment of risk,[106] the issue to be addressed is whether there is reason to believe that the claimant's decision to exercise her right to form an opinion "on any matter in which the machinery of state, government, and policy may be engaged"[107] would place her in jeopardy upon return to her home state.[108]

First, there must be evidence that potential persecutors in the home state either are or could reasonably become aware of the claimant's views. In the case of *Emil Pers,*[109] for example, the Board dismissed the claim of a Polish farmer and Solidarity sympathizer, who had illicitly sold crops directly to the public:

> The applicant testified that he had not given any public expression to his political opinions. His political actions — selling his produce on the black market and distributing pamphlets on behalf of Solidarity — were clandestine and, consequently, unknown to any authorities. . . . The claim therefore fails essentially because the Board finds it improbable in the extreme that one could reasonably develop a fear of persecution by reasons of political opinions which are officially non-existent.[110]

Where home authorities have no actual knowledge of a claimant's convictions, it is sufficient to show that her views could reasonably lead to a clash with those in positions of power:

> Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.[111]

Since political expression is a core human right, the claimant must enjoy a reasonable expectation of tolerance of peacefully articulated views. It is therefore inappropriate simply to discount the risk of harm on the ground that the claimant could avoid detection by keeping silent. This position has yet to be fully acknowledged in the Canadian case law.[112] In the recent case

[106] *See* Section 3.1, *supra.*

[107] G. Goodwin-Gill, *The Refugee in International Law*, p. 31 (1983).

[108] With respect to the issue of post-departure statements of political opinion designed to secure access to asylum abroad, *see* Section 2.1.2, *supra.*

[109] Immigration Appeal Board Decision M86-1634X, February 17, 1987; affirmed on other grounds by Federal Court of Appeal Decision A-123-87, January 12, 1988.

[110] *Id.*, at 4-5, *per* E. Brown.

[111] UNHCR, *supra*, note 42, p. 20. *Accord* Minister of Employment and Immigration, *supra*, note 101, at Guideline 11: "A person who is disposed to clash politically with authorities from his country and who will probably or possibly suffer persecution because of that disposition may be a refugee."

[112] In *Marina Galvis de Cardona*, the Board dismissed the claim of a Colombian student, noting that her participation in a peaceful protest march was an "imprudent action taken knowingly and deliberately": Immigration Appeal Board Decision 77-1120, August 2, 1978, at 12, *per* J.-P. Houle. Similarly, the Federal Court of Appeal in *Mauricio Esteban Lemoine Guajardo v. Minister of Employment and Immigration* suggested that voluntary self-identification as a Socialist would in some sense undercut the case of the Chilean claimant: Federal Court of Appeal Decision A-623-30, April 2, 1981, at 2, *per* Pratte J.; setting aside Immigration Appeal Board Decision V80-6284, C.L.I.C. Notes 41.9, December 1, 1981.

of *Wai Chee Lee,*[113] for example, the Board dismissed the claim of a Chinese national who would face serious consequences for the expression of his pro-capitalist political views:

> The Board rejects the contention that the fear of the consequences of expressing political opinions is synonymous with a fear of persecution for political opinion. . . . Mistreatment by reason of political activity or fear of mistreatment if political views were to be expressed are not, *ipso facto*, grounds under the Convention or the Act for claiming refugee status. The United Nations Convention and the *Immigration Act, 1976*, are not charters of political rights.[114]

This reasoning is at odds with the human rights context within which refugee law was established, and is inexplicably unsympathetic to persons who demonstrate the courage to challenge the conformism of authoritarian states.[115] Since the purpose of refugee law is to protect persons from abusive national authority, there is no reason to exclude persons who could avoid risk only by refraining from the exercise of their inalienable human rights.[116] As Kenneth Brill has argued,

> . . . refugee status is not restricted to martyrs. If an individual can demonstrate that flight was a manifestation of an opinion that would have resulted in persecution if expressed, should he be denied asylum if persecution would ensue upon deportation?[117]

In addition to actual or possible future government knowledge of the claimant's political opinion, there must be reason to believe that dissent will not be tolerated.[118] The mere holding of a dissident perspective, therefore, in

[113] Immigration Appeal Board Decision V87-6512X, December 21, 1987.

[114] *Id.*, at 7, *per* D. Anderson.

[115] To be preferred is the dissenting view of member Bruce Howard in the decision of *Hector Eduardo Contreras Guttierez*, who characterized the Chilean union activist as ". . . a young man with a cause whose actions at times are both heroic and foolish but at all times consistent with what some men have always done in such circumstances [of political oppression]": Immigration Appeal Board Decision V80-6220, C.L.I.C. Notes 30.11, March 16, 1981, at 17.

[116] "In view of the fact that the first paragraph of the Preamble to the Refugee Convention contains a direct reference to the Universal Declaration and the principle which thereby has been affirmed, 'that human beings shall enjoy fundamental rights and freedoms without discrimination', it seems reasonable to infer that a person may justly fear persecution 'for reason of political opinion' in the sense of the Refugee Convention if he is threatened with measures of a persecutory nature because of his exercise of or his insistence on certain of the 'rights' laid down in the Universal Declaration": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 227 (1966).

[117] K. Brill, "The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act" (1983), 32 Cleveland State L. Rev. 117, at 135.

[118] "Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This pre-supposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods": UNHCR, *supra*, note 42, p. 19.

the absence of evidence of a consequential risk of persecution, is not sufficient to establish a claim to refugee status.[119] In the case of anti-Communist Polish claimant *Adam Bohdan Moszczynski,*[120] for example, the Board ruled that "[m]erely holding opinions, contrary to the policies of the government, does not entitle a person to status as a Convention refugee. It is the fear of persecution for holding those opinions which is relevant to the refugee status determination."[121]

5.4.2 Political Opinion Implicit in Conduct

An alternative to grounding a claim on adherence to a political opinion *per se* is to rely on evidence of engagement in activities which imply an adverse political opinion, and which would elicit a negative governmental response tantamount to persecution.[122] As the UNHCR notes, threats of persecution

> . . . have only rarely been based expressly on "opinion". . . . It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.[123]

Delegates to the Conference on Territorial Asylum, for example, were prepared to accept that participation in "the struggle against colonialism and apartheid" was a valid expression of political opinion which could lead to a grant of refugee status.[124] As Atle Grahl-Madsen has noted, subject only to a neutrally applied criminality exclusion:[125]

> The Convention seeks to protect persons who would be subject to political persecution through no fault of their own. In this connexion the struggle for certain political convictions is not to be regarded as a fault but as a right founded in the Law of Nature.[126]

Traditionally it was thought that only those who enjoyed formal membership in a political party,[127] or indeed only those in political leadership roles

[119] *See*, e.g., *Marc Michel Cylien*, Immigration Appeal Board Decision 73-12462, March 21, 1974; *Meril Meryse*, Immigration Appeal Board Decision M73-2608, April 30, 1975; *Gladys Maribel Hernandez*, Immigration Appeal Board Decision M81-1212, January 6, 1983.

[120] Immigration Appeal Board Decision V87-6285, March 7, 1988.

[121] *Id.*, at 5, *per* N. Singh.

[122] A. Grahl-Madsen, *supra*, note 116, p. 129.

[123] UNHCR, *supra*, note 42, p. 20. *Accord* C. Wydrzynski, *Canadian Immigration Law and Procedure*, p. 331 (1983).

[124] U.N. Doc. A/CONF.78/12, at Art. 2(1)(a), adopted by the Committee of the Whole on a 45-15-22 vote. *See* R. Plender, "Admission of Refugees: Draft Convention on Territorial Asylum" (1977), 15 San Diego L.Rev. 45, at 57; and E. Lentini, "The Definition of Refugee in International Law: Proposals for the Future" (1985), 5 Boston College Third World L.J. 183, at 192.

[125] *See* Section 6.3.2, *infra.*

[126] A. Grahl-Madsen, *supra*, note 116, p. 223.

[127] *See*, e.g., *Marc Georges Sévère* (1974), 9 I.A.C. 42, at 55; *Jim Martin Kwesi Mensah*, Immigration Appeal Board Decision V79-6136, August 7, 1979, at 3; set aside on other grounds by Federal Court of Appeal Decision A-527-79, May 2, 1980, and by Federal Court of Appeal Decision A-524-80, March 10, 1981 ("[H]e held no office and in fact never took out a membership card"); *Manuel Jesus Torres Quinones*, Immigration Appeal Board Decision V81-6153, May 11, 1981, set aside on other grounds by the Federal Court of Appeal at (1982), 45 N.R. 602 ("[H]e took no active part in election propaganda, or public service campaigns and restricted his involvement to doing government business in his garage and supporting [Socialist Party] social functions").

within a party,[128] could qualify for refugee status on the basis of political opinion. However, as was cogently observed by dissenting Board member N. Singh in *Bakhshish Gill Singh:*[129]

> While one might expect the authorities to arrest and persecute the leaders and the high profile members of an organization, more often than not, to avoid adverse publicity and political ramifications, the leaders are left alone and the brunt of the persecution is borne by the rank and file members whose rights are easily violated.[130]

The excessive formalism of earlier judgments on actions which imply a political opinion has thus given way to a new jurisprudence which focuses on the attitudes and proclivities of the government in the applicant's state of origin:

> Nowhere in the Convention does it say that to be considered a refugee an applicant must have been prominent in the political life of his country of origin. The crucial test is that certain behaviour or actions on the part of the applicant are or have been perceived by the authorities in power as political opposition. For the purposes of applying this test, the Board cannot ignore the reputation a particular political regime has for intolerant suppression of any form of opposition. . . .[131]

[128] *See*, e.g., *Azam Faceed Narine*, Immigration Appeal Board Decision V79-6140, C.L.I.C. Notes 15.15, December 5, 1979, at 5 ("There is no evidence he was a central political figure, that he held office of any kind or enjoyed or possessed power"); *Gyeabour Stephen Obeng Fosu*, Immigration Appeal Board Decision V80-6032, February 14, 1980, at 2; affirmed without reasons by Federal Court of Appeal Decision 81-A-12, October 20, 1981 (". . . there is no evidence of any militant involvement or leadership role of any kind. . ."); *Romilio Dictmart Aranda Diaz*, Immigration Appeal Board Decision V80-6225, C.L.I.C. Notes 23.7, July 30, 1980, at 2; affirmed on other grounds by Federal Court of Appeal Decision A-588-80, March 20, 1981 (". . . Mr. Aranda held no important position in the [Chilean Socialist] party. He was just one of the members"); *Christolene Permaul*, Immigration Appeal Board Decision T83-9310, April 13, 1983; previously considered by the Federal Court of Appeal at (1983), 53 N.R. 323 ("Mrs. Permaul was a member of the P.P.P. with no specific functions or duties to perform other than attend meetings about once a month and sometimes distribute pamphlets"); *Leonel Eduardo Quinteros Hernandez*, Immigration Appeal Board Decision V80-6192, January 31, 1985, at 9 ("He never was a leader or executive member of the M.E.R.S. . ."); *Jatinder Singh*, Immigration Appeal Board Decision T83-10505, February 26, 1986, at 3 ("Mr. Singh himself was never an officer of the party but was just a member of the Akali Dal as are about 80% of the farmers in the rural area of the Punjab").

[129] Immigration Appeal Board Decision V87-6246X, July 22, 1987.

[130] *Id.*, at 12, *per* N. Singh. *Accord* C. Wydrzynski, *supra*, note 123, p. 331: "[T]he extent of political involvement or activity is not determinative of the claim, but, rather, most important is the treatment that the claimant has received or is likely to receive for the political activities. Minimal political activity can give rise to a well-founded fear of persecution. . . ."

[131] *Raul Rodolfo Lira Pastene,* Immigration Appeal Board Decision M79-1132, March 28, 1980, at 4, *per* J.-P. Houle.

Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of a political opinion.

This standard derives from a trilogy of decisions of the Federal Court of Appeal, all involving citizens of Chile. In *Re Ricardo Andres Inzunza Orellana and Minister of Employment and Immigration,*[132] the Court considered the application of a member of a Chilean church group who had organized anti-government theatrical performances. While the Immigration Appeal Board rejected the claim on the ground that "the applicant was never involved in any political activities",[133] the Federal Court noted in *obiter* that

> . . . the crucial test in this regard should not be whether the Board considers that the applicant engaged in political activities, but whether the ruling government of the country from which he claims to be a refugee considers his conduct to have been styled as political activity.[134]

Three months later, the Federal Court released its decision in the case of *Leonardo Arturo Espinosa Astudillo v. Minister of Employment and Immigration,*[135] involving a young man who had been the president of his school's sports club in Chile. Applying the dictum from the *Inzunza Orellana* decision, the Court found that ". . . in view of the considerable evidence referred to. . . to the effect that the government of Chile considered his activities in the Sports Club as being political, I hold the view that the Board erred in law in not giving due and proper consideration to the very relevant and cogent evidence."[136] This principle was further defined by the Federal Court in *Angel Eduardo Jerez Spring v. Minister of Employment and Immigration:*[137]

> . . . the Board should not forget that an activity which might have no political significance to us, if it had taken place in Canada, might be seen by a foreign government as having such significance.[138]

This notion of "political opinion" as a relative concept has been regularly applied by both the Immigration Appeal Board[139] and the Federal Court

[132] (1979), 103 D.L.R. (3d) 105 (F.C.A.).

[133] Immigration Appeal Board Decision T78-9213, December 19, 1978, at 6, *per* U. Benedetti.

[134] *Supra*, note 132, at 109, *per* Kelly D.J. Commenting on this decision, Wydrzynski writes that "[t]his principle seems to make the interpretive process somewhat more objective, and to benefit the claimant by recognizing that persecution is an irrational activity which may be a response to expression or activity considered harmless, or within the scope of recognized fundamental freedoms. . .": *supra*, note 123, p. 330.

[135] (1979), 31 N.R. 121 (F.C.A.); setting aside Immigration Appeal Board Decision 78-9178, November 16, 1978.

[136] *Id.*, at 122-23, *per* Heald J.

[137] Federal Court of Appeal Decision A-361-80, December 4, 1980; affirming Immigration Appeal Board Decision M79-1170, C.L.I.C. Notes 21.9, May 26, 1980.

[138] *Id.*, at 2, *per* LeDain J.

[139] *See,* e.g., *Moise Danilo Bahamondes Peralta*, Immigration Appeal Board Decision M79-1082, C.L.I.C. Notes 18.9, December 12, 1979, at 3, *per* J.-P. Houle ("The particular circumstances of an individual in relation to the situation in the country of his nationality must be taken to include the perception the authorities in power in that country have or could have of the individual's political activities"); *Saam Yagasampanthar Murugesu*, Immigration Appeal Board Decision M82-1142, September 30, 1983, at 9, *per* G. Loiselle ("[T]he crucial test in interpreting political activities is whether the ruling government in the country from which refuge is sought considers the conduct in question as political activity"); *Paul Valdez Schwarz*, Immigration Appeal Board Decision 84-9787, C.L.I.C. Notes 84.8, March 17, 1986; *Mario Arturo Fernandez Ortigoza*, Immigration Appeal Board Decision V83-6704, January 26, 1987; *Shahram Nassiribake*, Immigration Appeal Board Decision V87-6134, April 23, 1987; affirmed on procedural grounds by Federal Court of Appeal Decision A-272-87, April 14, 1988.

of Appeal.[140] Among those acts which have been construed as expressions of political opinion are the unwillingness of an Iranian woman to wear the chador and attend Islamic functions,[141] the decision of Salvadoran parents to remove their son from the possibility of forced conscription,[142] a Tunisian soldier's alleged betrayal of his military oath,[143] engagement in espionage by a Syrian on behalf of the United States,[144] and even the refusal of a Guatemalan to declare a political opinion to local authorities.[145] The focus is always to be the existence of a *de facto* political attribution by the state of origin, notwithstanding the objective unimportance of the claimant's polit-

[140] *See,* e.g., *Francisco Humberto Gonzalez Galindo v. Minister of Employment and Immigration,* [1981] 2 F.C. 781 (C.A.); *Luis Rene Amayo Encina v. Minister of Employment and Immigration,* Federal Court of Appeal Decision A-720-80, February 27, 1981; *Alfredo Manuel Oyarzo Marchant v. Minister of Employment and Immigration,* [1982] 2 F.C. 779 (C.A.); *Yaw Owusu Adjei*, Federal Court of Appeal Decision A-498-81, February 25, 1982; *Akrimul Huque Chowdhury v. Deputy Attorney General of Canada*, Federal Court of Appeal Decision A-468-87, May 12, 1988.

[141] "[W]hile her family did not engage in overtly political acts, her actions and those of her relatives and friends would be construed by the authorities as anti-government": *Modjgan Shahabaldin*, Immigration Appeal Board Decision V85-6161, March 2, 1987, at 6, *per* J. MacLeod.

[142] "It is possible for an applicant who has never participated in the political life of his country to fear persecution because he has been wrongly associated with a political movement for one reason or another. The basic criterion is to determine whether the government running the country attributes political activities to the applicant": *Maria Alva Rina Rivera*, Immigration Appeal Board Decision M85-1453, September 22, 1987, at 2, *per* J. Blumer.

[143] *Mohamed Heidi Mahouachi,* Immigration Appeal Board Decision M84-1036, September 11, 1986.

[144] "[E]spionage against the Syrian Government for the benefit of a country whose democratic institutions are the same as those of Canada may be considered a political act for which the claimant can be given refugee status": *Tayshir Dan-Ash*, Immigration Appeal Board Decision M86-1420, October 20, 1986, at 10, *per* J. Cardinal; set aside on procedural grounds by Federal Court of Appeal Decision A-655-86, June 21, 1988. This characterization is a good example of the "ethnocentric gloss" often placed upon the concept of political opinion: *see* M. Ryan, "Political Asylum for the Haitians?" (1982), 14 Case Western Reserve J. Intl. L. 155, at 171.

[145] "It is apparent that the applicant has gone out of his way to avoid expressing a dangerous political opinion, but nevertheless, because of his refusal to respond to the Judiciales' questions, he has been deemed by them to hold political opinions antagonistic to the regime": *Mario Roberto Gudiel Medina*, Immigration Appeal Board Decision V83-6313, C.L.I.C. Notes 69.2, March 28, 1984, at 4-5, *per* B. Howard. *Accord Bolanos Hernandez v. I.N.S.*, 767 F. 2d 1277 (9th Cir. 1985), at 1286: "Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction."

ical acts,[146] her own inability to characterize her actions as flowing from a particular political ideology,[147] or even an explicit disavowal of the views ascribed to her by the state.[148]

The equivalent evolution of the notion of political opinion in the United States[149] has been criticized by Donald Gagliardi as agreeable, though unwise because it is potentially over-inclusive:

> It is unwise to presume that persecution practiced by a government is necessarily political and based on disagreement. . . . It is not unheard of for a government attempting to suppress internal dissent to proceed with a purposefully over-inclusive program of oppression, especially where the government is unable to distinguish dissenters from the surrounding population adequately. . . . To regard this form of oppression as persecution based on political opinion. . . would substitute a rule that the politics of an alien need not be considered in asylum or deportation proceedings where the alien's government has engaged in random oppression.[150]

[146] "Neither the applicant's minor role nor the length of his absence from Pakistan were relevant in the light of the uncontradicted evidence which the Board had accepted, namely, that others who had played the same role had been persecuted. . .": *Tahir Ahmad Nawaz Chaudri v. Minister of Employment and Immigration* (1986), 69 N.R. 114 (F.C.A.), at 117, *per* Hugessen J.; setting aside Immigration Appeal Board Decision T82-10012, October 23, 1984. *See also Leonel Eduardo Quinteros Hernandez*, Immigration Appeal Board Decision V80-6192, January 31, 1985, at 3, *per* E. Chambers: "While those fortunate enough to live in a free and democratic society may attribute no political offence to his action, we cannot substitute our opinion for that of the military government of his native land."

[147] "A person claiming refugee status. . . because of political opinion does not have to be in conflict with the government of his nationality because of deeply held ideological differences. His controversy can result from actions which the government considers captious and, therefore, worthy of oppression": *Fernando Alfonso Naredo Arduengo*, Immigration Appeal Board Decision T80-9159, C.L.I.C. Notes 27.13, November 20, 1980, at 8-9, *per* D. Davey.

[148] *Maria Alva Rina Rivera*, Immigration Appeal Board Decision M85-1453, September 22, 1987, at 2.

[149] *See Hernandez Ortiz v. I.N.S.*, 777 F. 2d 509 (9th Cir. 1985); *Coriolan v. I.N.S.*, 559 F. 2d 993 (5th Cir. 1977); *Bolanos Hernandez v. I.N.S.*, 767 F. 2d 1277 (9th Cir. 1985); *Arqueta v. I.N.S.*, 759 F. 2d 1395 (9th Cir. 1985); *Desir v. Ilchert*, 840 F. 2d 723 (9th Cir. 1988). This position has not always been adhered to by the Board of Immigration Appeals, as evinced in the decision of *Matter of Acosta*, Interim Decision 2986, March 1, 1985, at 32: "[P]ersecution means the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome. . . . Thus, the requirement of persecution on account of political opinion refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of persecution." Appellate courts have recently paid some deference to this view: *see*, e.g., *Perlera-Escobar v. E.O.I.R.*, 884 F. 2d 1292 (11th Cir. 1990). *See generally* D. Anker and C. Blum, "New Trends in Asylum Jurisprudence" (1989), 1 Intl. J. Refugee L. 67, at 76 ff.

[150] D. Gagliardi, "The Inadequacy of Cognizable Grounds of Persecution as a Criterion for According Refugee Status" (1987-88), 24 Stanford J. Intl. L. 259, at 279. *Accord* M. Heyman, "Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife" (1987), 24 San Diego L.Rev. 449, at 460: "The Ninth Circuit has probably incomprehensibly distorted the concept of political opinion. It has become something that may be nonideological and neutral, held for whatever reason (since motivation is irrelevant), and may be expressed in only 'silent' conduct, indeed may not be expressed at all. By this thinking, literally anyone — and therefore everyone — possesses political opinion. . . ."

This reasoning, however, assumes that the rationale for refugee law is in some sense the protection of persons on the basis of personal merit, e.g., those who possess a particular political opinion,[151] rather than the establishment of a surrogate protection system for those whose membership in the national community has been fundamentally denied.[152] Viewed from the latter perspective, the broad characterization of political opinion is an important means of maintaining the Convention's vitality in circumstances where the basis for oppression may not be readily ascertainable.

5.5 Membership of a Particular Social Group

The fifth enumerated ground for persecution, membership of a particular social group, was introduced with little explanation by the Swedish delegate as a last minute amendment to the Refugee Convention:

> . . . experience had shown that certain refugees had been persecuted because they belonged to particular social groups. . . . Such cases existed, and it would be as well to mention them explicitly.[153]

Who were the intended beneficiaries of this provision? On the one hand, it is argued that membership of a particular social group should be seen as "clarifying certain elements in the more traditional grounds for persecution",[154] those being race, religion, nationality, and political opinion. This was Canadian practice for some years, resulting in the recognition of social group claims only when the social group could be defined on the basis of one of the other four forms of civil or political status:

> Either the group must be political and proclaim and exhibit dissidence with the regime or be a religious sect which has been persecuted by the civil authorities because of its religious beliefs. In a multinational state, a racial minority might also constitute such a group.[155]

Under this approach, the notion of membership of a particular social group became largely superfluous,[156] since the groups which were recognized —

[151] "The 'syllogistic' reasoning. . . operates as follows: every extraditee or deportee who can establish certain acts or conditions as legitimately 'political' is entitled to asylum; therefore, offenders considered unworthy of asylum, or refugees considered inexpedient to accept, must be classified as nonpolitical": Note, "Political Legitimacy in the Law of Political Asylum", 99 Harvard L.Rev. 450, at 451.

[152] *See* text *supra* at note 1 ff.

[153] Statements of Mr. Petren of Sweden, U.N. Doc. A/CONF.2/SR.3, at 14, November 19, 1951; and U.N. Doc. A/CONF.2/SR.19, at 14, November 26, 1951. The Swedish amendment (incorporated in U.N. Doc. A/CONF.2/9) was adopted without discussion by a vote of 14-0-8.

[154] G. Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the UNHCR" (1980), Michigan Y.B. Intl. L. Studies 291, at 297.

[155] *Obertz Belfond* (1975), 10 I.A.C. 208, at 222, *per* J.-P. Houle.

[156] "[T]he more narrow construction that IAB opinions have accorded the term 'social group' has effectively eliminated the term's use as an independent ground for finding persecution": R. Sexton, "Political Refugees, Nonrefoulement and State Practice: A Comparative Study"

illegal expatriates,[157] human rights activists,[158] and various anti-government associations — could already be protected under the rubric of one of the other four categories.[159] The inappropriateness of this neutering of the social group criterion was noted by the Federal Court of Appeal in *Attorney General of Canada v. Patrick Francis Ward:*[160]

> It was the contention of counsel for the Respondent that any reasonably definable organization *engaged in political activity* may be included in the definition [of a particular social group]. If that were so, I find it difficult to understand why it was necessary to include in the definition the term "a particular social group" when the term "political opinion" is part of the definition.[161]

Alternatively, the plea has been made to interpret membership of a particular social group as an essentially all-embracing "safety net",[162] requiring only some recognizable similarity of background among group members.[163] The position is most forcefully put by Arthur Helton,[164] who argues:

> The delegates intended to guarantee security from persecution to all refugees, without invidious or unnecessary distinctions. The "social group" category, designed to reaffirm this commitment, was adopted in the U.N. Convention without dissent, extending the protection of refugees far beyond what had previously been the norm. . . . The intent of the framers of the Refugee Convention was not to address prior persecution of social groups, but rather to save individuals from future injustice. The "social group" category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up.[165]

Helton goes on to suggest that all groups protected under any U.N. human rights convention, whether defined in statistical, societal, social, or associational terms, should be considered within the scope of the Convention.[166]

The notion of social group as an all-encompassing residual category is seductive from a humanitarian perspective, since it largely eliminates the need to consider the issue of a linkage between fear of persecution and civil or political status. Yet this is precisely the reason that Helton's analysis cannot stand. The drafters of the Convention did not wish to avoid drawing distinctions among various types of putative refugees, but rather intended to establish a demarcation between those whose fear was attributable to civil or political status (refugees) and those whose concern to flee was prompted by other concerns (not refugees).[167] Moreover, their purpose was anything but the creation of a regime to address new, future injustices, as Helton suggests. It is clear from the comments of the Swedish proponent of the social group category[168] and others that the Convention was designed simply as a means of identifying and protecting refugees from known forms of harm,[169] not of anticipating future, distinct types of state abuse. The liberal attempt to give life to the notion of social group has therefore gone too far, effectively disregarding the fourth element of the Convention definition. This trend has nonetheless been endorsed in some Canadian case law,[170] including in recent comments of the Federal Court of Appeal[171] which seem to define

(1985), 18 Vanderbilt J. Transntl. L. 731, at 788. *Accord* C. Wydrzynski, "Refugees and the Immigration Act" (1979), 25 McGill L.J. 154, at 180.

[157] "It may be argued that when the punishment for illegal departure is excessive, all illegal expatriates constitute a special group and are persecuted for membership in that group": T. Le and M. Esser, "The Vietnamese Refugee and U.S. Law" (1981), 56 Notre Dame Lawyer 656, at 664.

[158] In *Emeline Gabriel*, the Immigration Appeal Board held participation in the Haitian "Ligue des droits de l'homme" to qualify as membership in a particular social group: Immigration Appeal Board Decision M86-1128, C.L.I.C. Notes 105.13, March 10, 1987, at 6, *per* R. Julien.

[159] *See* Section 5.4, *supra*.

[160] Federal Court of Appeal Decision A-1190-88, March 5, 1990; leave to appeal granted by the Supreme Court of Canada on November 8, 1990: Supreme Court Bulletin 2347.

[161] *Id.*, at 8, *per* Urie J.

[162] Foighel has argued that the social group criterion ". . . came into existence, inter alia, as a type of safety net in that this category was to include also race and ethnicity and, furthermore, was to operate as a kind of comprehensive provision for the categories of persons who had a legitimate claim upon being considered refugees in the international sense, although they were not clearly included in the categories specifically mentioned": I. Foighel, "Legal Status of the Boat People" (1979), 48 Nordisk Tidsskrift for Intl. Ret. 217, at 222.

[163] "[I]t seems appropriate to give the phrase a liberal interpretation. Whenever a person is likely to suffer persecution merely because of his background, he should get the benefit of the present provision": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 220 (1966). *See also* G. Goodwin-Gill, *The Refugee in International Law*, p. 30 (1983), and P. Hyndman, "The 1951 Convention Definition of Refugee" (1987), 9 Human Rts. Q. 49, at 71.

[164] A. Helton, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" (1983), 15 Columbia Human Rts. L.Rev. 39.

[165] *Id.*, at 41-42 and 45.

[166] *Id.*, at 44-46 and 51 ff.

[167] "The different categories of refugees to which the proposed convention should apply must be clearly indicated; it would be difficult for the Governments to ratify a convention which otherwise would amount to a kind of document signed in blank to which could be subsequently added new categories of beneficiaries without number": Statement of Mr. Cha of China, U.N. Doc. E/AC.32/SR.5, at 2, January 30, 1950. *Accord*, e.g., Mr. Henkin of the U.S.A.: "[T]he obligations of signatory States must be accurately defined and that could not be done unless the categories to benefit were fixed at a given date. The States concerned could subsequently extend the scope of their obligations, but they could not undertake unlimited obligations in advance": U.N. Doc. E/AC.32/SR.3, at 13, January 26, 1950.

[168] *See* text *supra* at note 153.

[169] The United States successfully argued that the Convention should concern itself with "'neo-refugees', the definition of which was broad enough to allow the inclusion of persons who had left their home since the Second World War as a result of political, racial or religious persecution, or those who might be obliged to flee from their countries for similar reasons in the future": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.3, at 10, January 26, 1950.

[170] "The Board is of the opinion that the ground 'membership in a particular social group' is a ground which must be given a broad and liberal interpretation in order to protect groups or individuals who do not necessarily have political, religious or racial ties at the root of their fear of persecution. Otherwise, this ground of 'social group' would be of very little value": *Richard Cid Requena Cruz*, Immigration Appeal Board Decision T83-10559, C.L.I.C. Notes 95.10, April 8, 1986, at 5, *per* G. Vidal.

[171] *Attorney General of Canada v. Patrick Francis Ward,* Federal Court of Appeal Decision

a particular social group simply as a group of persons "associated, allied, combined"[172] and "united in a stable association with common purposes",[173] with the possible caveat that its goals must not challenge "democratically constituted authority".[174]

A middle ground position which avoids reading "membership of a particular social group" as either redundant or all-inclusive was defined by the United States Board of Immigration Appeals in its decision in *Matter of Acosta:*[175]

> We find the well-established doctrine of *ejusdem generis*, meaning literally, "of the same kind," to be most helpful in construing the phrase "membership in a particular social group". That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words. . . . The other grounds of persecution. . . listed in association with "membership in a particular social group" are persecution on account of "race", "religion", "nationality", and "political opinion". Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. . . . Thus, the other four grounds of persecution enumerated. . . restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution. Applying the doctrine of *ejusdem generis*, we interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution. . . .[176]

A-1190-88, March 5, 1990; leave to appeal granted by the Supreme Court of Canada on November 8, 1990: Supreme Court Bulletin 2347.

[172] *Id.*, at 10, *per* Urie J.

[173] *Id.*, at 4, *per* MacGuigan J.

[174] *Id.*, at 7, 20-21, *per* Urie J. The Court's exclusion of groups dedicated to the overthrow of "democratically constituted authority" from the scope of the social group category is an unfortunate amalgam of the fourth and fifth elements of the refugee definition. Rather than recasting the Convention's notion of social group to bar anti-democratic factions, such concerns ought to be addressed under the rubric of the Convention's exclusion clauses, adopted into Canadian law in 1989 (*see* Chapter 6, *infra*).

[175] Interim Decision 2986, March 1, 1985.

[176] *Id.*, at 37-39.

This formulation includes within the notion of social group (1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.

By basing the definition of "membership of a particular social group" on application of the *ejusdem generis* principle, we respect both the specific situation known to the drafters — concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories[177] — and the more general commitment to grounding refugee claims in civil or political status. Beyond that, the linkage between this standard and fundamental norms of human rights correlates well with the human rights-based definition of "persecution".[178] Most important, the standard is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague[179] as to admit persons without a serious basis for claim to international protection. As observed in the American decision of *Sanchez Trujillo v. I.N.S.,*[180] ". . . the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance".[181] Rather, a "particular social group" must be definable by reference to a shared characteristic of its members which "is fundamental to their identity".[182]

The balance of this part examines the application of the social group criterion so construed, as it relates to issues of gender, sexual orientation, family, class or caste, and voluntary associations.

[177] "The addition was intended to ensure that the Convention would embrace those — particularly in Eastern Europe during the Cold War — who were persecuted because of their social origins": R. Plender, "Admission of Refugees" (1977), 15 San Diego L.Rev. 45, at 52.

[178] *See* Section 4.2, *supra*.

[179] In his concurring judgment in *Attorney General of Canada v. Patrick Francis Ward*, Mr. Justice MacGuigan warned that the notion of a "particular" social group excludes groups which can only be defined in "nebulous" terms: *supra*, note 171, at 8, fn. 3.

[180] 801 F. 2d 1571 (9th Cir. 1986).

[181] *Id.*, at 1576, *per* Beezer J.

[182] *Id.* The Court goes on to make an unfortunate reference to the importance of a particular social group being defined by reference to a "voluntary associational relationship", although that comment is immediately contradicted by the recognition of the family (an obviously non-voluntary association) as "a prototypical example" of a particular social group: *Id.*, at 1576. In any event, Mr. Justice MacGuigan's decision in *Attorney General of Canada v. Patrick Francis Ward* makes clear that in Canada, a particular social group may be either natural or "non-natural": *supra*, note 171, at 4.

5.5.1 Gender

Gender-based groups are clear examples of social subsets defined by an innate and immutable characteristic. Thus, while gender is not an independent enumerated ground for Convention protection, it is properly within the ambit of the social group category.[183] The Executive Committee of the UNHCR endorsed this approach in its 1985 conclusion on "Refugee Women and International Protection":

> . . . States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1(A)(2) of the 1951 United Nations Refugee Convention.[184]

The decision in *Zekiye Incirciyan*[185] offered the first clear indication that Canadian law would follow the international lead. This case involved a Turkish widow, who had no close family in that country. She was harassed on a daily basis by young men, was sexually assaulted, and was the object of an abduction attempt. The Immigration Appeal Board found that the government was unwilling to protect the claimant because, in the authorities' view, it was inappropriate for her to be living without the protection of a male relative. Accordingly, the Board determined Mrs. Incirciyan to be a refugee by reason of her membership of a particular social group composed of "single women living in a Moslem country without the protection of a male relative."[186] This category meets the test for a particular social group, since gender and the absence of male relatives are not within the control of group members, and choice of marital status is a freedom guaranteed under core norms of international human rights law.[187] Early decisions of the Immigration and Refugee Board have similarly recognized the appropriateness of the social group designation for women in Lebanon[188] and for Tamil women in Sri Lanka.[189] Men, too, have occasionally benefitted from gender-specific interpretations of the social group category, as in *Oscar Roberto Cruz*[190] where the Board noted that the Salvadoran claimant was "a young man, a member of the broad social group that is the primary target of military and guerrilla alike".[191] While some have expressed reservations about the broad ambit of gender-defined social groups,[192] adherence to the *ejusdem generis* principle defeats such concerns, since race, nationality, religion, and even political opinion are also traits which are shared by large numbers of people.

5.5.2 Sexual Orientation

Homosexual and bisexual women and men constitute a second group defined by a fundamental, immutable characteristic. The Federal Administrative Court of Germany addressed the potential for homosexuality to define a "particular social group" in a 1986 decision involving the alleged persecution of an Iranian male by reason of his sexual orientation.[193] Noting the persecution of homosexuals in the Nazi concentration camps, the Court recognized the viability of considering sexual orientation as the basis for a claim to refugee status, assuming it to be an irreversible personal characteristic.

While the precise issue has not yet been adjudicated in Canada, the basis for treating sexual orientation as an immutable characteristic capable of defining a social group was established by the decision of the Federal Court Trial Division in *Timothy Veysey v. Commissioner of the Correctional Service of Canada.*[194] The applicant in that case alleged a breach of his right to equality by reason of the refusal of prison officials to extend the conjugal visitation policy in force for heterosexual spouses to include also homosexual spouses. In finding a violation of the equality rights provision of the Char-

[183] *See*, e.g., D. Indra, "Gender: A Key Dimension of the Refugee Experience" (1987), 6(3) Refuge 3; and J. Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989), 1(4) Intl. J. Refugee L. 518.

[184] U.N. Doc. HCR/IP/2/Rev. 1986, at Conclusion No. 39 (XXXVI), para. (k), July 8, 1985. The Executive Committee adopted additional conclusions which addressed the special needs of women refugees in each of 1987 and 1988. *See generally* A. Johnson, "The International Protection of Women Refugees: A Summary of Principal Problems and Issues" (1989), 1(2) Intl. J. Refugee L. 221.

[185] Immigration Appeal Board Decision M87-1541X, August 10, 1987.

[186] *Id.*, at 1, *per* P. Davey.

[187] UDHR, *supra*, note 71, at Art. 16; ICCPR, *supra*, note 71, at Art. 23.

[188] Immigration and Refugee Board Decision T89-00260, July 1989, R.L.R.U. Cat. Sig. 10143, at 3, *per* G. Carson: "The Immigration Appeal Board decision in *Incirciyan* was brought to the attention of the Refugee Division. The decision, which is not binding on the Refugee Division, refers to single Moslem women living in a Moslem country without the protection of a male relative, as constituting members of a particular social group. The Refugee Division agrees with the basic concept as set out in *Incirciyan*."

[189] Immigration and Refugee Board Decision M89-01213, June 1989, R.L.R.U. Cat. Sig. 10240; Immigration and Refugee Board Decision M89-00407, July 1989, R.L.R.U. Cat. Sig. 10147; Immigration and Refugee Board Decision M89-01225, July 1989, R.L.R.U. Cat. Sig. 10017.

[190] Immigration Appeal Board Decision V83-6807, June 26, 1986.

[191] *Id.*, at 2, *per* B. Howard. *Accord*, e.g., *Marco Antonio Valladares Escoto*, Immigration Appeal Board Decision T87-9024X, July 29, 1987, at 6, *per* D. Davey: "[I]f the allegations were well-founded, the Board could find Mr. Escoto to be a Convention refugee by reason of his having belonged to a particular social group, young men of eligible age for military duty, who were subject to mistreatment after indiscriminate recruitment, a distinct group which made it the object of persecution."

[192] In reference to the notion of young, urban class Salvadoran males as constituting a particular social group, the U.S. Court of Appeals for the Ninth Circuit noted that ". . . such an all-encompassing grouping. . . is not that type of cohesive, homogenous group to which the term 'particular social group' was intended to apply": *Sanchez Trujillo v. I.N.S.*, 801 F. 2d 1571 (9th Cir. 1986), at 1577.

[193] Verwaltungsgerichthof Hessen, August 21, 1986, Ref. 10 OE 69/83, reported as IJRL/004 in (1989), 1(1) Intl. J. Refugee L. 110.

[194] (1989), 29 F.T.R. 74 (T.D.); appeal against this judgment dismissed by Federal Court of Appeal Decision A-557-89, May 31, 1990.

ter of Rights and Freedoms, Mr. Justice Dubé applied the *ejusdem generis* test to define the scope of non-enumerated heads of equality. His conclusions are unmistakably pertinent to the definition of "particular social group" in refugee law:

> Most of the grounds enumerated in s. 15 of the Charter as prohibited grounds of discrimination connote the attribute of immutability, such as race, national or ethnic origin, colour, age. One's religion may be changed, but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability. Another characteristic common to the enumerated grounds is that the individuals or groups involved have been victimized and stigmatized throughout history because of prejudice, mostly based on fear or ignorance, as most prejudices are. This characteristic would also clearly apply to sexual orientation, or more precisely to those who have deviated from accepted sexual norms, at least in the eyes of the majority.[195]

5.5.3 Family

In view of the recognition in international law of the family as "the natural and fundamental group unit of society [which] is entitled to protection by society and the State",[196] it is not surprising that refugee claims based on family affiliation have been recognized as within the scope of the social group category, both in Canada and elsewhere.[197] Indeed, one of the few provisions which delegates to the unsuccessful Conference on Territorial Asylum were able to agree upon was the inclusion of "kinship" as a proper basis for the recognition of refugee status.[198]

The first Canadian decision to raise the possibility that one's family might constitute a particular social group within the meaning of the Convention definition was the 1979 judgment of the Federal Court of Appeal in *Astudillo v. Minister of Employment and Immigration.*[199] There followed a series of judgments of the Immigration Appeal Board which impliedly accepted this

[195] *Id.*, at 78, *per* Dubé J.

[196] UDHR, *supra*, note 71, at Art. 16(3); ICCPR, *supra*, note 71, at Art. 23(1).

[197] *See*, e.g., C. Blum, "Legal Perspectives on U.S. Jurisprudence Regarding Central American Refugee Claims" (1987), 7(1) Refuge 12. In Decision 16 A 10001/88 of the German Obeverwaltungsgericht (High Administrative Court), May 23, 1988, it was observed that "[p]ersecution of kin. . . is an objective reason which can be compared to the persecution of members of a specific social group, as in both cases one reason for the threat of political persecution is the persecution others suffer": Reported as IJRL/0021 in (1989), 1(3) Intl. J. Refugee L. 394.

[198] The Committee of the Whole adopted the Australian proposal, U.N. Doc. A/CONF.78/C.1/L.10, on a vote of 40-24-15: *see* A. Grahl-Madsen, *Territorial Asylum*, p. 209 (1980). The draft convention, however, was not adopted. *See* Section 1.4.2, *supra*.

[199] "While there may be some question as to whether his immediate family can be said to be 'a social group' within the meaning of the definition, there can be no doubt that the 'Sports Club' was a 'social group' as that term is used in the definition": (1979), 31 N.R. 121 (F.C.A.), at 123, *per* Heald J.

premise by recognizing the claims of siblings[200] and children[201] of activists, as well as those made by members of politically prominent families more generally.[202] It was not until the case of *Richard Cid Requena Cruz,*[203] however, that family was clearly stated to be a part of the concept of particular social group. In response to the petition of a young Peruvian who was the object of police harassment in consequence of the escape from the country of his father, the Board observed:

> The application, based on social group, raises the question as to whether or not a family can be considered a social group for the purposes of the *Immigration Act, 1976.* The answer to that question is a qualified yes. In some cultures, including Latin America, certain African nations and some others, for example, it is quite likely that an individual will be assumed to be a supporter of specific social, religious or political ideas merely because a father, uncle or other prominent family member is a known advocate of those ideas. This is not always so, however, and each case must be decided on its own merits on the basis of evidence presented.[204]

The *Requena Cruz* doctrine has been applied in a variety of circumstances, including the claims of the wife of a Chilean socialist,[205] the cousin of an opponent of the Guyanese government,[206] and the son of the organizer of a coup in Ghana.[207] As a rule, therefore, whenever there is an indication that the status or activity of a claimant's relative[208] is the basis for a risk

[200] *Bernarda Lucia Ramirez Cordero,* Immigration Appeal Board Decision M79-1211, C.L.I.C. Notes 28.10, December 12, 1980.

[201] *Askale Asnake*, Immigration Appeal Board Decision M80-1020, C.L.I.C. Notes 31.10, February 23, 1981.

[202] "We who live in a democratic society where order is maintained by peaceful means may find it hard to believe that the authorities would harass someone either directly or through his family simply because he bore a name that they held in abomination. However, we must keep our personal opinions to ourselves, and instead try to place the situation in its proper context": *Luis Enrique Toha Seguel*, Immigration Appeal Board Decision 79-1150, C.L.I.C. Notes 28.8, November 13, 1980, at 4, *per* J.-P. Houle.

[203] Immigration Appeal Board Decision T83-10559, February 8, 1984.

[204] *Id.*, at 3, *per* B. Howard.

[205] "Her claim was based largely on the claim of her husband, Mr. Pizarro. The Board held in *Requena Cruz* that a family does constitute a social group and that a claim based on family affiliation was within the purview of the definition of Convention refugee. Therefore, the Board is also prepared to consider her claim on the basis of her family relationship with Mr. Pizarro": *Maria Angelica Jiminez Ormeno Pizarro*, Immigration Appeal Board Decision V87-6004, January 26, 1988, at 2, *per* A. Wlodyka, affirmed without comment by the Federal Court of Appeal at (1990), 8 Imm. L.R. (2d) 223.

[206] This case recognized the sufficiency of a "family connection to an outspoken highly visible political opponent of the government": *Cleopatra Ramsingh*, Immigration Appeal Board Decision M86-1138, September 15, 1987, at 9, *per* P. Davey.

[207] *Morgan Otuo Acheampong*, Immigration Appeal Board Decision T84-9275, C.L.I.C. Notes 68.4, May 29, 1984.

[208] *See*, e.g., D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L.Rev. 1125, at 1146-47.

of persecution, a claim grounded in family background[209] is properly receivable under the social group category. Moreover, as the decision in *Maria Mabel de la Barra Velasquez*[210] suggests, the notion of family is culturally relative, and may extend significantly beyond nuclear and blood relationships.

5.5.4 Class or Caste

A fourth form of particular social group encompasses immutable forms of class and caste. While it is often suggested that notions of class and social group are essentially coterminous,[211] the general definition posited above[212] excludes a social class defined by a changeable characteristic of a non-essential nature. For example, the members of a privileged social class who resist renunciation of economic privilege are not protected, since it is within their ability voluntarily to renounce their property, an interest which is not protected under core human rights norms.[213]

The exclusion would not apply, however, if the members of the privileged class were forever stigmatized for their origins even after renouncing their property, since past status is an immutable characteristic. In the case of *Luis Folhadela Carneiro de Oliveira,*[214] for example, the Board examined the claim of a Portuguese millionaire industrialist whose vast holdings had been nationalized and confiscated by the government which came to power in 1974. While this fact alone ought not to constitute the basis for a refugee claim, the Board was of the view that the claimant's fear of reprisals for his *past* social status, including the possibility of arrest without trial, was sufficient to bring him within the definition of membership of a particular social group.

In contrast to wealth or even middle class status, both of which can ordinarily be the subject of voluntary alienation, poverty as an economic class may

[209] *See* G. Goodwin-Gill, *The Refugee in International Law*, p. 30 (1983).

[210] Immigration Appeal Board Decision V80-6300, C.L.I.C. Notes 39.7, April 29, 1981. This case recognized a Chilean claim grounded on the activities of the applicant's mother's sister's husband and his brother.

[211] "A social group is essentially a social class": A. Fragomen, "The Refugee: A Problem of Definition" (1970), 3 Case Western Reserve J. Intl. L. 45, at 59. *Accord* B. Tsamenyi, "The 'Boat People': Are They Refugees?" (1983), 5 Human Rts. Q. 348, at 366: "This concept [of a particular social group] may therefore be understood to cover situations in which a person suffers persecution merely because of his background. This may include a person's being a member in a class within a society, for example, as a bourgeois, landowner, or civil servant."

[212] *See* text *supra* at note 176 ff.

[213] *But see* T. Le and M. Esser who argue that the Vietnamese "who left as a result of government action (such as the creation of 'New Economic Zones' or the promulgation of decrees eliminating private ownership)" qualify within the social group category: "The Vietnamese Refugee and U.S. Law" (1981), 56 Notre Dame Lawyer 656, at 664-65. This would not be so under the framework suggested here, unless the stigma of past status persisted in the face of a renunciation of wealth. The opportunity to own private property and to engage in the full range of wealth-generating activities are not fundamental, internationally recognized human rights. *See* Section 4.5.2, *supra*.

[214] Immigration Appeal Board Decision 75-10382, April 20, 1976.

constitute a particular social group, since membership cannot always voluntarily be given up:

> . . . the poor as a class. . . may constitute a persecuted "social group" when the economic conditions underlying their poverty are attributable to the exercise or maintenance of political power. If in a given country the poor are kept poor by those in power in order to maintain the current political structure — if all or substantially all economic opportunity is foreclosed — a victim of such poverty suffers "substantial economic disadvantage" on account of his membership in the lower class.[215]

Similarly, an economic class is within the scope of a particular social group where membership, though nominally voluntary, is the only means of ensuring basic subsistence, an interest protected under core norms of human rights law.[216] In the case of *Joseph Alexis Manasse,*[217] the Immigration Appeal Board correctly held membership in the Haitian peasant landowning class to be a form of particular social group, since in the context of a poor, agrarian society, membership in the class represents a means of access to basic needs. The central question, therefore, in examining wealth-based categories or classes is whether the group's defining characteristic is either innate or unchangeable, or if subject to voluntary alienation, whether it is premised on the realization of basic human rights. In all other cases, it would be reasonable to expect an applicant to accommodate herself to less privileged circumstances as an alternative to the invocation of international protection.

Beyond economics, class may also be defined in purely social terms, as in the context of a feudal or caste system,[218] or on the basis of education or occupation. In the case of Haitian *Jean Robert Amazan,*[219] for example, the Board concluded that the applicant's membership in "a threatening social group, [namely] educated young persons"[220] was sufficient to bring him within the ambit of the Convention definition. Insofar as class designations are inalienable, or can be disclaimed only at the expense of basic human rights, they may therefore appropriately be seen as defining a particular social group.

5.5.5 Voluntary Associations

Perhaps the most contentious aspect of the social group concept relates to membership in associations from which voluntary alienation is possible. Normally, the social group designation is concerned with the protection of

[215] Note, "Political Legitimacy in the Law of Political Asylum" (1985), 99 Harvard L.Rev. 450, at 461.

[216] *See* Section 4.5.2, *supra*.

[217] Immigration Appeal Board Decision M87-1634X, September 9, 1987.

[218] *See*, e.g., Z. Rizvi, "Causes of the Refugee Problem and the International Response", in A. Nash, ed., *Human Rights and the Protection of Refugees under International Law*, p. 112 (1988).

[219] Immigration Appeal Board Decision M87-1502X, December 7, 1987.

[220] *Id.*, at 2, *per* M. Durand.

persons from abuse based on characteristics which are beyond their control — gender, sexual orientation, family, and most forms of class or caste. However, as the decision in *Matter of Acosta*[221] suggests, immutability should be interpreted to include "a characteristic that either is beyond the power of an individual to change *or is so fundamental to individual identity or conscience that it ought not be required to be changed.* . . ." [Emphasis added][222] Thus, membership in a voluntary association defined by a non-fundamental purpose, such as recreation or personal convenience, would normally be seen to be outside the scope of the notion of a particular social group.[223] Conversely, where the purpose of the voluntary association is essential to individual identity or conscience, it is reasonable that members should have access to international protection where there is a risk of persecution for failure to renounce such basic interests. This approach is consistent with the decision of the Federal Court of Appeal in *Attorney General of Canada v. Patrick Francis Ward*,[224] in which an attempt was made to define the social group concept as applied to voluntary associations by examining the legal acceptability of their goals.[225]

Students are thus logically included within the social group category, since the pursuit of education is a basic international human right.[226] This characterization was raised as a possibility by the Federal Court of Appeal's decision in *Gladys Maribel Hernandez,*[227] and has been adopted by the Immigration Appeal Board in *Jesus Antonio Miranda Cuellar.*[228] More generally, groups defined by employment or profession fall within the social group category, since freedom to choose one's occupation is also a basic right.[229]

[221] Interim Decision 2986, March 1, 1985.

[222] *Id.*, at 38. This notion is in keeping with interpretation based on the *ejusdem generis* principle, since religion and political opinion are similarly subject to alienation, though at a cost inconsistent with core notions of human rights.

[223] *But see* Grahl-Madsen, who argues for the inclusion within the concept of particular social group of "certain associations, clubs or societies": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 219 (1966).

[224] Federal Court of Appeal Decision A-1190-88, March 5, 1990; leave to appeal granted by the Supreme Court of Canada on November 8, 1990: Supreme Court Bulletin 2347.

[225] *Id.*, at 20-21, *per* Urie J. While the Court arguably draws the line too narrowly by its reference to respect for "the rule of law" as a distinguishing factor, the basic approach of enfranchising voluntary associations the purposes of which conform to basic legal norms is helpful.

[226] UDHR, *supra*, note 71, at Art. 26; *International Covenant on Economic, Social and Cultural Rights*, U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force January 3, 1976 ("*ICESCR*"), at Art. 13. *Accord* G. Goodwin-Gill, *The Refugee in International Law*, p. 30 (1983); D. Anker, "Defining a 'Social Group'" (1983), 6 Immigration J. 15, at 15.

[227] Federal Court of Appeal Decision, May 20, 1982, at 2-3.

[228] Immigration Appeal Board Decision 80-9204, C.L.I.C. Notes 26.9, November 20, 1980.

[229] UDHR, *supra*, note 71, at Art. 23; ICESCR, *supra*, note 226, at Art. 6. *Accord* A. Grahl-Madsen, who includes "civil servants, businessmen, professional people, farmers, workers" within the social group category: *supra*, note 223, p. 219. As Angela Botelho notes, "A social group based on occupational criteria certainly falls within the parameters of the use of the term [social group] in sociological literature. . . . The advantage of an occupationally-based definition lies in its limited and clearly delineated contours, and in its susceptibility to certain evidentiary requirements at the proof stage of asylum proceedings": A. Botelho, "Membership in a Social Group: Salvadoran Refugees and the 1980 Refugee Act" (1985), 8 Hastings Intl. Comp. L.Rev. 305, at 335. *See Manuel Jesus Torres Reyes et al v. Minister of Manpower and Immigration*, Federal Court of Appeal Decision, October 28, 1976, in which Mr. Justice Pratte noted the possibility that one's status as a former civil servant might be a basis for the recognition of refugee status; also *Emeline Gabriel*, Immigration Appeal Board Decision M86-1128, C.L.I.C. Notes 105.13, March 10, 1987, at 5, regarding persecution by reason of the political opinions of the applicant's employer.

Trade union membership has also been accepted as the basis for refugee status in decisions such as *Wilfredo Alejandro Zubieta*[230] and *Oscar Trujillo Barraza.*[231] In all of these examples, voluntary participation is appropriately protected because of its linkage to core principles of human rights. The interests which underlie membership in the associations are so fundamental that international protection is in keeping with the underlying rationale for the social group category.

5.6 Other Grounds for Claiming Refugee Status

In determining whether there is a nexus between the claimant's fear of persecution and her civil or political status, care must be taken to examine the substantive, rather than the merely formal, grounds for seeking protection. In particular, claims which are based on activity which is criminalized in the country of origin, which relate to failure to perform military service, or which involve escape from war or violence may, under some circumstances, fall within the scope of the Convention definition, the absence of an obvious link to one of the five enumerated grounds notwithstanding. Under the veneer of a protection need apparently unrelated to civil or political status, there is often a political or other cause which is sufficient to establish a claim to refugee status.

5.6.1 Criminal Status: Prosecution or Persecution?

It is clear that refugee status may not be invoked by an individual solely on the basis that she is at risk of legitimate prosecution or punishment for breach of the ordinary criminal law.[232] As the UNHCR has noted:

[230] "The next question is whether the applicant has been persecuted because of his membership in such a particular social group. In my opinion, the fact of having been fired for union activities, arbitrarily labelled as a terrorist, considered along with the other fact that the applicant had been constantly harassed (according to the evidence which was not refuted) in his search for a living for himself and his family, constitutes persecution which interferes with the right to work and the dignity of a human being as we understand these in Canada": Immigration Appeal Board Decision 79-1034, C.L.I.C. Notes 14.10, October 31, 1979, at 2-3, *per* J.-P. Houle.

[231] Immigration Appeal Board Decision 77-9449, March 23, 1978. *Accord* UDHR, *supra*, note 71, at Art. 23(4); ICESCR, *supra*, note 226, at Art. 8; ICCPR, *supra*, note 71, at Art. 22(1).

[232] *See*, e.g., A. Grahl-Madsen, *supra*, note 223, p. 192.

> Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim — or potential victim — of injustice, not a fugitive from justice.[233]

This proposition was propounded as part of Canadian law in the decision of *Louis-Paul Mingot*,[234] in which it was held that "[f]ear of being legally prosecuted before regular courts. . . [cannot] *in se* and *per se*, constitute a fear of persecution as defined in the Convention".[235] This is so even if the justice system in the country of origin fails to meet generalized standards of fairness, or the range of penalties ordinarily imposed in that nation seems out of line with the norms in other states. The case of Ghanaian *Anthony Appiah Asamoah*,[236] for example, raised the issue of an individual at risk of prosecution under very stringent laws for having allowed fire to destroy another's crops, who claimed refugee status on the basis of the inappropriateness of summary prosecution and severe penalties for offences of this kind. In rejecting his claim, the Board noted:

> . . . he has shown that he fears prosecution for an economic offence in Ghana, an offence which indeed may carry severe penalties with it and may not proceed entirely in accordance with Canada's criminal justice and evidentiary rules. . . [but] this offence is not directed solely against the applicant himself, but rather is applied to the population of Ghana in general. How this can be characterized as persecution is a question which has not been answered. . . .[237]

Such claims are outside the scope of the Convention because the risk faced by the claimant is only the potential criminal liability of every citizen, and is therefore not linked to a form of civil or political status enumerated in the definition. Insofar as an examination of both the nature of the criminal offence and its prosecution and punishment confirms that the offence is politically neutral in substance and application, then it cannot serve as the basis for a claim to refugee status.

On the other hand, Richard Plender has observed that while persecution and prosecution are not coterminous, neither are they mutually exclusive.[238] Because both the content and implementation of the criminal law are within the control of the state of origin,[239] it is possible for a government with persecutory intent to use the criminal law as a means of oppressing its opponents.[240] In such circumstances, it makes no sense to treat those at risk of

[233] UNHCR, *supra*, note 42, at 15.

[234] (1975), 8 I.A.C. 351.

[235] *Id.*, at 356, *per* J.-P. Houle.

[236] Immigration Appeal Board Decision T87-9902, January 19, 1988.

[237] *Id.*, at 3-4, *per* J. Weisdorf.

[238] R. Plender, "Admission of Refugees" (1977), 15 San Diego L.Rev. 45, at 54.

[239] K. Kawahara, "Analysis of Results of the First Session of the International Conference on Territorial Asylum", in International Institute of Humanitarian Law, ed., *Round Table on Some Current Problems of Refugee Law* 23 (1978).

[240] G. Goodwin-Gill, *supra*, note 226, p. 34.

politically inspired abuse of the criminal law as fugitives from justice; they are rather potentially at risk of persecution, and may properly be assessed as refugees.[241] This perspective is consistent with the internal structure of the Convention, the exclusion clauses of which[242] deny refugee status not to all "criminals" *per se*, but only to a person who "has committed a serious *non-political* crime outside the country of refuge. . ." [Emphasis added].[243] Similarly, the Draft Convention on Territorial Asylum provides for a clarification of the refugee definition to embrace persons at risk of "prosecution or punishment for reasons directly related to. . . persecution".[244]

Canadian law has only recently begun to examine critically the context of alleged criminality in a comprehensive way. In *Ethem Ictensev*,[245] the Board posed the question,

> When is a political action permissible although forbidden by law? Clearly, for our purposes, the fact that a political action is taken outside of the law is in itself not sufficient to invalidate a claim. However, the question posed cannot be answered in a simplistic fashion, for it involves the consideration of a large number of issues ranging from human rights to state security; from natural justice to emergency measures.[246]

A turning point was reached in the decision of Ghanaian *Godfred Appiah Kubi*,[247] involving an individual charged with the "criminal offence" of distributing anti-government pamphlets. After conducting a thorough review of the conflicting Canadian jurisprudence, the Board concluded that ". . . the commission of an offence should not *automatically* lead to the conclusion that the claimant's fear is of prosecution and punishment".[248] Looking beyond the alleged illegality of the act, the Board in this case noted that "[d]istributing pamphlets is often the only means of expressing contrary opinions in countries where there are restrictions on freedom of expression, a fundamental human right,"[249] and accordingly determined the criminal characterization of the claimant's actions to be without foundation.

[241] "It is now, in effect, recognized by all civilised states that ordinary criminals are to be extradited and that persons who fear punishment for political reasons may be granted protection by the receiving State": F. Krenz, "The Refugee as a Subject of International Law" (1966), 15 I.C.L.Q. 90, at 101. *Accord* D. Roth, "The Right of Asylum Under United States Immigration Law" (1981), 33 U. Florida L.Rev. 539, at 553-54: "The Board is therefore required to distinguish between violations of law that are essentially criminal and those which are political."

[242] *See* Section 6.3.2, *infra*.

[243] Convention, *supra*, note 11, at Art. 1(F)(b).

[244] A. Grahl-Madsen, *Territorial Asylum*, p. 208 (1980). *Accord* R. Plender, *supra*, note 238, at 58.

[245] Immigration Appeal Board Decision T87-9494X, October 19, 1987.

[246] *Id.*, at 13, *per* P. Ariemma.

[247] Immigration Appeal Board Decision T87-9053, June 10, 1987.

[248] *Id.*, at 4, *per* E. Townshend.

[249] *Id.*, at 6.

In what circumstances is it appropriate to give careful scrutiny to an allegation that a claimant is outside the scope of the definition because her fear derives only from genuine criminality? One set of concerns relates to the nature of the offence on the basis of which the claimant has been charged or convicted: Is it either an inherently political offence, or an ordinary criminal offence applied in politically suspicious circumstances? As noted by Gerard LaForest in relation to the law of extradition:

> . . . although the terminology of "political offence" is widespread, a satisfactory definition remains to be formulated. The term embraces two concepts: first, the purely political offence (e.g. treason, sedition, espionage, etc.), which is an act directed against the political organization or government of a state and contains no element of common crime, and secondly, what is described. . . as an offence of a political character, one that is a common crime but is so closely integrated with political acts or events that it is regarded as political.[250]

Alternatively, even if the offence itself is apparently a legitimate exercise of criminal law authority, has the enforcement of an otherwise proper law been somehow distorted to achieve a persecutory end? Where, for example, the decision to prosecute, the process under which the charge is heard, or the nature of the sentence imposed is politically manipulated, the refugee claim should not be dismissed as raising a simple issue of "fear of prosecution or punishment", but should instead be examined on its merits.

The notion of an "absolute political offence"[251] is based on the proposition that there is a range of activity which is outside the proper scope of the criminal law.[252] In the result, any "criminal" prosecution grounded in an illegitimate exercise of criminal law authority cannot be relied upon to exclude a claimant from refugee status.[253] The most readily recognizable form of absolute political offence is an attempt to criminalize the exercise of a fundamental human right,[254] at least insofar as the criminal prohibition applies in circumstances not recognized as emergency exceptions under international human rights law.[255] While Canadian law has shown a marked reluctance to apply this concept, for example in regard to freedom of political expression[256] and

[250] G. LaForest, *Extradition to and from Canada,* p. 63 (1977).

[251] *See generally* G. Goodwin-Gill, *The Refugee in International Law*, p. 38 (1983).

[252] K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 727.

[253] *Rebecca Fogel v. Minister of Manpower and Immigration*, (1976) 7 N.R. 172 (F.C.A.), at 175, *per* Thurlow J.

[254] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 83 (1966); K. Petrini, *supra*, note 252, at 727. With regard to freedom of political speech in particular, *see* D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L.Rev. 1125, at 1142.

[255] *See* Section 4.2, *supra*, particularly at note 73 ff.

[256] *See*, e.g., *Anil Kapur*, Immigration Appeal Board Decision T81-9450, August 26, 1981, at 3, *per* E. Teitelbaum ("His fear of returning to India derives from the warrant out for his arrest for having violated a prohibition order rather than from a substantiated fear of political persecution"); *Mahibur Rahman Chowdhury*, Immigration Appeal Board Decision T83-10497, C.L.I.C. Notes 90.8, February 13, 1986 (in which the claim of an individual sought under a warrant issued in consequence of participation in a political demonstration was dismissed on the basis of criminality); *Karnail Heer Singh*, Immigration Appeal Board Decision V87-6167X, June 3, 1987, at 10, *per* F. Wright; affirmed by Federal Court of Appeal Decision A-474-87, April 13, 1988 ("The applicant may be afraid of being arrested by the police again if he returns to India and engages in similar demonstrations. . . . In the opinion of the Board, this fear of prosecution does not represent a well-founded fear of persecution"); *George Goka Darko*, Immigration Appeal Board Decision T87-9173X, June 16, 1987, at 7, *per* C. De Morais ("Is the applicant fleeing persecution because he organized and participated in one demonstration. . . or prosecution for organizing and participating in an illegal march and destroying private property?").

the right to leave one's country,[257] it is clearly unreasonable to accept at face value the state of origin's characterization of the exercise of a core human right not only as illegitimate, but as just cause for punishment.

The case of Chilean *Hector Eduardo Contreras Guttierez*[258] illustrates this point. The claimant was a union organizer at the national transportation company. While the right to form and join labour unions is unequivocally recognized in international human rights law,[259] the Chilean government outlawed such activities, and inflicted severe punishment on those suspected of supporting the trade union movement. The majority of the Board noted simply that "[s]uch activities are understood by the Court to be illegal",[260] and dismissed the claim. In a stirring dissent, member Bruce Howard underscored the importance of refusing to disallow claims grounded in an absolute political offence:

> Were the union activities illegal, as my colleague says? Of course they were, but we are not asked to judge legality and illegality in Chile. We are judging *persecution* as defined in the Act.[261]

[257] This issue is discussed in detail at Section 2.2.1, *supra*. *See*, e.g., *Maria Sandor*, Immigration Appeal Board Decision 79-9145, C.L.I.C. Notes 9.16, May 14, 1979, at 2, *per* A. Weselak ("She further states that should she return to Hungary now she would be put in jail because she refused to go back to Hungary from Austria. . . . [W]hile she may be subject to prosecuion upon her return, this is not a matter which can be considered to be persecution"); *Lech Jankowski*, Immigration Appeal Board Decision V80-6410, January 5, 1981, at 4-5, *per* B. Howard ("Unfortunately the definition. . . contains no reference to fear of punishment for a crime against the ordinary laws of the applicant's country. Moreover it is not reasonable that a person may place himself in jeopardy with the laws of his country by desertion and thereby claim special status if it is that act itself which creates the claim for refugee status"); *Henryk Stanley Komisarski*, Immigration Appeal Board Decision V81-6162, May 28, 1981, at 2, *per* C. Campbell, regarding a Pole who abandoned ship in Canada ("[V]iolating the laws of one's country and having to face the consequences does not make one a refugee"). *But see* the slightly more liberal judgment in *Stanislaw Julian Jodlowski*, Immigration Appeal Board Decision V81-6166, June 18, 1981, at 6-7, *per* D. Davey ("A person who flees his country [for a Convention reason]. . . is justified in placing before the Board his additional fear of reprisal for leaving his country in an unlawful manner. Such action, by itself, does not make a person a Convention refugee").

[258] Immigration Appeal Board Decision V80-6220, C.L.I.C. Notes 30.11, March 16, 1981.

[259] UDHR, *supra*, note 71, at Art. 23(4); ICCPR, *supra*, note 71, at Art. 22; ICESCR, *supra*, note 226, at Art. 8.

[260] *Supra*, note 258, at 4, *per* W. Hlady.

[261] *Id.*, at 12, *per* B. Howard.

In addition to "criminal" offences which are fundamentally illegitimate, a second category of concern is comprised of "relative political offences", which Atle Grahl-Madsen defines as

> . . . "common crimes" such as murder, robbery, burglary, etc. committed not for personal gain, but out of political motives. . . . [I]t is often considered right to classify perpetrators of such crimes as political offenders and not as common criminals. . . .[262]

While some argue that political intent does not take away from the common law character of such crimes,[263] both Grahl-Madsen[264] and Guy Goodwin-Gill[265] recognize that in appropriate circumstances, politically motivated common crime should not bar access to refugee protection. It would, of course, be appropriate to consider the genuineness of the political purpose of the act (as distinguished from more typically criminal motives such as personal gain); the extent of the linkage between the act committed and the political purpose being pursued; and, perhaps most important, the proportionality of the good sought to be attained in relation to the harm inflicted through the crime.[266] Where the motivation is genuine, the strategy credible, and the incidental harm tolerable in relation to the goal sincerely pursued, it is reasonable to view the action as more fundamentally political than criminal,[267] and hence to assess the refugee claim on its merits.[268]

[262] A. Grahl-Madsen, *supra*, note 254, p. 84.

[263] *See*, e.g., C. Pompe, "The Convention of 28 July 1951 and the International Protection of Refugees", [1956] Rechtsgeleerd Magazyn Themis 425, published in English as U.N. Doc. HCR/INF/42, May 1958, at 9; K. Zink, quoted in A. Grahl-Madsen, *supra*, note 254, p. 221; and F. Marino-Menendez, "El concepto de refugiado en un contexto de derecho internacional general" (1983), 35(2) Revista española de derecho intl. 337, at 355-56.

[264] "The Convention seeks to protect persons who would be subject to political persecution through no fault of their own. In this connexion, the struggle for a certain political conviction is not to be regarded as a fault but as a right founded in the Law of Nature": A. Grahl-Madsen, *supra*, note 254, p. 223.

[265] "The international community does not exist for the purpose of preserving established governments, and the political offence exception may be considered valuable for its dynamic quality": G. Goodwin-Gill, *The Refugee in International Law*, p. 38 (1983).

[266] *Id.*, at 60-61. On the susceptibility of politically motivated terrorism to this analysis, *see McMullen v. I.N.S.*, 788 F. 2d 591 (U.S.C.A., 9th Cir. 1986), at 597: "Such acts are beyond the pale of a protectable 'political offense.' These actions were directed solely at bringing about social chaos, with the eventual demise of the state intended only as an indirect result. . . . There is a meaningful distinction between terrorist acts directed at the military or official agencies of the state, and random acts of violence against ordinary citizens that are intended only 'to promote social chaos.'" *Quaere* the appropriate margin of appreciation where targeted assaults prove an insufficient incentive to abandon repression.

[267] "To fall within the [notion of a political offence], the act charged must have been committed as an incident or in furtherance of a political end": G. LaForest, *supra*, note 250, p. 63. *Accord Schtraks v. Government of Israel*, [1964] A.C. 556 (H.L.), in which purpose and motive are held to be key concerns in describing an offence as political in nature.

[268] There is a range of opinion among states on this issue. The Board of Immigration Appeals in the United States, for example, has rejected the appropriateness of this form of balancing:

The traditional Canadian view has been hostile to the notion of relative political offences. In *Musial v. Minister of Employment and Immigration,*[269] the Federal Court of Appeal held:

> A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, *not for the political opinions that may have induced him to commit it.* [Emphasis added][270]

Similarly, in *Surujpal v. Minister of Employment and Immigration,*[271] the Federal Court examined the claim of a Guyanese citizen who, opposed to the one-party dominance in his country, defaced government election posters, and was consequently incarcerated for a week in unsanitary and unhealthy prison conditions. The Court dismissed the political significance of this event:

> Since this was by the applicant's own admission an arrest and imprisonment according to law (although he may not have realized it at the time), it could not establish a well-founded fear of persecution.[272]

The Immigration Appeal Board has similarly rejected the relative political offence concept on a number of occasions, resulting in the failure fully to assess the merits of the claims of a Salvadoran revolutionary,[273] an opponent of the Pinochet dictatorship in Chile found in possession of illicit weapons,[274] and even a naïve young Guyanan who believed that he could disrupt a corrupt election by stealing a ballot box![275] While each of these cases raises *prima facie* issues of criminality, the underlying political premise of the claimants' actions brings them within the relative political offence category, thus warranting a full examination of the merits of the refugee claim.

The relative political offence notion does enjoy something of a toehold

Matter of Rodriguez-Coto, Interim Decision 2985, February 21, 1985, at 3. *See*, e.g., G. Goodwin-Gill, *supra*, note 265, pp. 31 ff.

[269] (1981), 38 N.R. 55 (F.C.A.).

[270] *Id.*, at 60, *per* Pratte J.

[271] (1985), 60 N.R. 73 (F.C.A.).

[272] *Id.*, at 74, *per* MacGuigan J.

[273] "Apart from his account of his activity as a militant revolutionary, Mr. Lazo Cruz gave no evidence of his political philosophy or opinions. . . . If he is fearful of returning to El Salvador. . . then that fear flows from violent criminal activity which is beyond the definition of a 'refugee'. . .": *Jose Antonio Lazo Cruz*, Immigration Appeal Board Decision V80-6004, C.L.I.C. Notes 18.12, January 16, 1980, at 3, *per* C. Campbell.

[274] "He knew that the authorities had called for the surrender of all firearms and he had ample opportunity to do so. . . . His excuse for not doing so, namely, his perception that the coup would be short lived, and secondly, his fear that the weapons may have been previously used in some illegal activity indicates a fear of prosecution for possession of illegal firearms and not a well-founded fear of persecution": *Jorge Pizarro Parada*, Immigration Appeal Board Decision V87-6004, January 26, 1988, at 12, *per* A. Wlodyka; affirmed on other grounds by Federal Court of Appeal Decision A-696-88, April 3, 1989.

[275] "When the election was over he stole the ballot box, and whatever the justification is in his mind, this was a criminal act for which he must expect to answer": *Azam Faceed Narine*, Immigration Appeal Board Decision V79-6140, C.L.I.C. Notes 15.15, December 5, 1979, at 5, *per* C. Campbell.

in Canadian law. In 1982, the Immigration Appeal Board recognized in *Mohammad Mushtaq*[276] that the existence of a warrant for the claimant's arrest in Pakistan for disturbing the public peace could be probative of a risk of persecution, rather than simply a fear of prosecution. Similarly, an affirmative decision was rendered in the case of *Nana Kwasi Yeboah,*[277] involving a Ghanaian accused of the offence of "smuggling" for his part in spiriting opponents of the Rawlings dictatorship out of that country. Perhaps most significant is the decision in *Tayshir Dan-Ash:*[278]

> Prosecution for the commission of a crime under the laws of a given country does not correspond to persecution under the terms of the Convention. However, if such a crime is committed for political purposes, its punishment may be considered as persecution. . . . Whether prosecution and punishment amount to persecution in the sense of the Convention depends on the following factors: the object and purpose of the law, the precise motivation of the individual who breaches such law, the "interest" which such individual asserts and the extent of the punishment.[279]

In reviewing this decision, the Federal Court of Appeal left the door open to the evolution of a relative political offence concept in Canadian law, without in fact endorsing such a development:

> The Board was of the view that the respondent's admitted espionage against the Syrian government was a political act inspired by his political opinions and that this qualified him for refugee status. Assuming, without deciding, that this could be so and given the fact that the espionage, for which he was well paid, was the only apparent manifestation of [the] respondent's alleged political opinions, the Board's position is clearly dependent upon its finding that he was a credible witness. . . .[280]

Beyond instances in which the criminal substance of the offence is doubtful in either absolute or relative terms, it is also possible for the procedure in an otherwise legitimate and appropriate prosecution to be politically subverted. Insofar as this interference or bias results in a differential level of risk to persons defined by civil or political status, it may also remove the "prosecution" to the realm of persecution. The subversion may be of three kinds.

[276] Immigration Appeal Board Decision M81-1122, C.L.I.C. Notes 47.6, October 26, 1982.

[277] "Although the smuggling of two people out of Ghana could be considered by that country as a criminal offence, in the situation that prevails today in that country under a non-democratic government, it could be possible that the applicant would face serious consequences if returned to his home country": Immigration Appeal Board Decision T81-9165, C.L.I.C. Notes 42.9, May 11, 1982, at 4-5, *per* U. Benedetti.

[278] Immigration Appeal Board Decision M86-1420, October 20, 1986.

[279] *Id.*, at 10, *per* J.-P. Cardinal. The test cited is derived from G. Goodwin-Gill, *supra*, note 265, p. 35. This formulation does not explicitly raise the issue of proportionality of means to end, a critical concern in determining the acceptability of the breach of criminal law standards in the interest of advancing political goals.

[280] *Minister of Employment and Immigration v. Tayshir Dan-Ash*, Federal Court of Appeal Decision A-655-86, June 21, 1988, at 3, *per* Hugessen J.

First, Canadian law recognizes the illegitimacy of politically selective prosecution.[281] As Douglas Gross explains:

> . . . an alien known to his government as a dissident may claim that he was punished for [a] crime, while others, equally culpable, were not. . . . [In such circumstances] it is fair to presume that the alien is really being persecuted for his political opinion.[282]

In the case of *Saam Yagasampanthar Murugesu,*[283] for example, the Board discounted the alleged criminality of the claimant, implying that he may have been inappropriately implicated by the local authorities as retribution for his political activism.[284] A similar concern was expressed in the decision of *So Wo Li:*[285]

> Were she to return or be returned [to China], her previous tormenters, with their access to the officials in power, might well use their position to have Ms. Li treated with extreme severity for this offence [of illegal departure]. While such treatment might, at first glance, be considered prosecution for a criminal offence, such a singling out of Ms. Li for vigorous prosecution by reason of her past refusal to collaborate with her tormenters would, in my opinion, constitute actual persecution.[286]

In addition to selective prosecution, the legitimacy of the criminal law process can also be undermined by a process of adjudication which ignores basic standards of fairness in order to effect or support political repression. As Atle Grahl-Madsen states:

> If actual or alleged perpetrators of political offences and other persons who for some reason or other have attracted the wrath of public officials are not brought to trial in judicial proceedings, but subjected to "administrative measures". . . it is hardly appropriate to try to distinguish between those who have actually committed a political offence. . . and those who are completely innocent. . . . In cases where the government resorts to such extra-legal, or at least extra-judicial, measures, it seems fitting to speak of political persecution rather than prosecution for political offences. The same may apply if the courts have lost their independence and are in fact only a prolonged arm of the executive.[287]

[281] "[P]ersons who would fear punishment for any non-political offence of general application. . . will normally be rejected [as refugees]. Of course, this interpretive principle is not absolute, and where it is shown that criminal prosecution. . . was used as a form of selective punishment by a State based on [an enumerated ground], a successful claim might be established on this basis": C. Wydrzynski, *Canadian Immigration Law and Procedure*, p. 323 (1983).

[282] D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L.Rev. 1125, at 1146.

[283] Immigration Appeal Board Decision M82-1142, July 13, 1982 and September 30, 1983.

[284] *See id.*, at 3-4 (judgment of September 30, 1983).

[285] Immigration Appeal Board Decision V88-00066X, September 23, 1988.

[286] *Id.*, at 9, *per* D. Anderson.

[287] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 84 (1966). *Accord* K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 727.

This proposition meshes well with traditional Canadian concern to exclude from refugee status only persons who fear "being *legally prosecuted* before *regular courts*" [Emphasis added].[288] In the decision of *Shane Gregory Brannson,*[289] for example, the Board went to great lengths to respond clearly to allegations of differential prosecution in the United States based on race. Similarly, in *Krishnapillai Easwaramoorthy,*[290] the Board held that the Sri Lankan claimant was actually in fear of prosecution only after satisfying itself of the adequacy of the judicial procedures which would be brought to bear in hearing the charge against him.[291] The principle was perhaps most poignantly stated in the case of Chilean *Jesus Enrique Retamal Sanchez,*[292] in which the Board vindicated the claimant since no weight could be attached to his failure to answer criminal charges in a judicial system which lacked political independence:

> Being a victim of a glaring, absurd and iniquitous parody, and knowing as a result that he was condemned in advance, the applicant decided to leave his country and seek asylum elsewhere.[293]

The third type of political interference sufficient to undercut the legitimacy of a criminal prosecution consists of the imposition of differential punishment upon conviction as a means of persecuting the government's opponents. Richard Plender suggests:

> . . . the current test is to determine whether the punishment that the fugitive can expect in consequence of his crime is any greater than that which would be meted out to an individual of different political or religious opinion who has committed a similar offence in the same country and at the same time.[294]

In Canada, general support for this proposition can be surmised from the judgment in *David Eugene Thomas:*[295]

> The [Refugee] Convention was not created to protect foreigners who are fugitives from justice and neither can the criminal sentence which the claimant received be considered as a measure of persecution in the sense of the Geneva Convention *since this sentence was of a non-political character.* [Emphasis added][296]

In sum, the exclusion of refugee claims which appear to be based on criminal prosecution must be carefully constrained. While it is true that genuine criminality is not a form of civil or political status which attracts protection, the criminal law is not infrequently manipulated as a tool of persecution. In such cases, involving subversion of the substantive purposes of the criminal law — absolute and relative political offences — or interference with an otherwise legitimate criminal process by selective prosecution, punitive denial of procedural fairness, or politically inspired sentencing, it cannot accurately be said that the claimant faces a risk of prosecution, rather than persecution. Claims of this sort should thus be assessed in accordance with the definition, and without consideration of their allegedly criminal context.

5.6.2 Refusal to Perform Military Service

Persons who claim refugee status on the basis of a refusal to perform military service are neither refugees *per se* nor excluded from protection. In general terms:

> A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.[297]

In this sense, the determination of a refugee claim grounded in refusal to perform military service is comparable to the issue of criminality just examined: the crucial question is whether the claimant can show that desertion or evasion is grounded in civil or political status, failing which the claim cannot succeed.

The insufficiency of a non-specific desire to escape a military service obligation is established by cases such as *Tadeusz Adamusik,*[298] in which the Immigration Appeal Board dismissed the claim of a Polish draft evader, noting simply that "[t]o serve in the armed forces is a duty of all Polish citizens and, therefore, the Board cannot consider Mr. Adamusik to be a refugee just for this reason".[299] This general position is derived from the notion,

[288] *Louis-Paul Mingot* (1973), 8 I.A.C. 351, at 356, *per* J.-P. Houle.

[289] Immigration Appeal Board Decision 80-9078, March 3, 1980; affirmed by Federal Court of Appeal Decisions A-213-80, June 5, 1980, A-161-80, October 9, 1980, and A-537-80, October 29, 1980; ultimately dismissed by the Immigration Appeal Board on October 30, 1980.

[290] Immigration Appeal Board Decision T82-9736, June 18, 1984; affirmed by Federal Court of Appeal Decision A-874-84, February 7, 1986; application for leave to appeal to the Supreme Court of Canada refused May 26, 1986.

[291] "[I]n the case at hand, the authorities issued a summons to the applicant to appear in court to answer allegations. The procedure that was adopted was far superior to the previous arrests and detentions of Mr. Easwaramoorthy in which the judicial system was conspicuously ignored": *Id.*, at 7, *per* D. Anderson.

[292] Immigration Appeal Board Decision 79-1110, C.L.I.C. Notes 19.7, April 23, 1980.

[293] *Id.*, at 7, *per* J.-P. Houle.

[294] R. Plender, "Admission of Refugees" (1977), 15 San Diego L.Rev. 45, at 56. *Accord* M. Posner, "Who Should We Let In?" (1981), 9 Human Rts. 16, at 18.

[295] (1974), 10 I.A.C. 44.

[296] *Id.*, at 47, *per* A. Weselak.

[297] UNHCR, *supra*, note 42, at 40.

[298] Immigration Appeal Board Decision 75-10405, January 15, 1976; affirmed by the Federal Court of Appeal at (1976), 12 N.R. 262.

[299] *Id.*, at 3, *per* U. Benedetti. *Accord Teresa del Carmen Opazo Opazo*, in which the Chilean claimant was told that she could not "be classified as a refugee merely because she wants to escape [her] military commitment": Immigration Appeal Board Decision V81-6067, March 5, 1981, at 2, *per* B. Howard; affirmed by Federal Court of Appeal Decision A-170-81, September 24, 1981.

noted in *Victor Fathy Kamel,*[300] that "[t]he Convention does not contain any sections dealing [specifically] with army deserters or conscientious objectors".[301] Simply put, the nexus between the harm feared and civil or political status is absent.

The first exception to the exclusion of military evasion and desertion from the scope of the Convention involves claims based on the fact that conscription for engagement in a legitimate and lawful purpose is conducted in a discriminatory manner, or that prosecution or punishment for evasion or desertion is biased in relation to one of the five Convention-based grounds of protection.[302] This is essentially the parallel of the distortion of the general criminal law for a discriminatory purpose discussed above:[303] where a form of state-sanctioned harm is inflicted through the subversion of an otherwise lawful system, the differential nature of the risk based on discriminatory administration may remove the claim from the realm of ordinary military conscription. Where, for example, only members of a particular racial group are subject to conscription, where the military service obligation is enforced more rigorously against persons of a particular political perspective, or where the penalty for evasion or desertion is applied differently to members of a given religious group, the refugee claim should be fully examined on its merits.

A second qualification to this rule arises when desertion or evasion reflects an implied political opinion as to the fundamental illegitimacy in international law of the form of military service avoided. As Gilbert Jaeger writes,

> . . . a broad perception in democratic countries is that there is considerable difference between military service by consent, instituted according to democratic legislative process and called upon to defend the life of a democratic society, on the one hand, and on the other hand, military service in a dictatorial or quasi-dictatorial regime called upon to defend institutions and policies unrelated to accepted human rights standards or, even worse, utilized for internal or external aggression. . . . [T]he right to refuse military service on account of its illegitimate political purpose. . . is formally acknowledged by the UN General Assembly; such refusal qualifies an individual for the grant of asylum and refugee status.[304]

As in the case of an absolute political offence,[305] there is a range of military activity which is simply never permissible, in that it violates basic international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for

[300] Immigration Appeal Board Decision 79-1104, C.L.I.C. Notes 15.11, August 1, 1979.

[301] *Id.*, at 5, *per* R. Tremblay.

[302] *See* UNHCR, *supra*, note 42, at 40.

[303] *See* text *supra* at note 281 ff.

[304] G. Jaeger, "The Definition of 'Refugee': Restrictive versus Expanding Trends", [1983] World Refugee Survey 5, at 7.

[305] *See* text *supra* at note 251 ff.

the conduct of war,[306] and non-defensive incursions into foreign territory.[307] Where an individual refuses to perform military service which offends fundamental standards of this sort, "punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution".[308]

This exception has been specifically recognized by the General Assembly of the United Nations in its Resolution 33/165, dealing with the status of persons refusing service in military or police forces used to enforce apartheid in South Africa.[309] Because such service is inherently violative of basic human rights, the General Assembly agreed to call upon states to

> . . . grant asylum or safe transit to another State, in the spirit of the Declaration on Territorial Asylum, to persons compelled to leave their country of nationality solely because of a conscientious objection to assisting in the enforcement of *apartheid* through service in military or police forces; [and urged] Member States to consider favourably the granting to such persons of all the rights and benefits accorded to refugees under existing legal instruments. . . .[310]

While the adoption of this principle into American law has recently been overturned,[311] Canadian law continues to acknowledge that refusal to perform military service inconsistent with international legal obligations is a sufficient basis for a claim to refugee status. In *Jorge Ardon Abarca,*[312] involving a Salvadoran who deserted the army because of its persecution of civilians, the Board recognized the merit of avoiding behaviour in breach of the rules designed to protect civilian non-combatants:

> Mr. Abarca does not blindly reject the thought of compulsory military service. In fact, he has shown a willingness to serve in the armed forces in his country. However, he is not willing to serve further if it means having to become part of a government force that is systematically killing innocent people just to instill fear and terror into the general public. He strongly objects to serving

[306] *See* International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949* (1983). The first convention deals with the protection of the wounded and the sick; the second with rules of maritime warfare; the third with fair treatment of prisoners of war; and the fourth with the protection of civilians.

[307] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations": *Charter of the United Nations*, 59 Stat. 1031, T.S. No. 993, June 26, 1945, entered into force October 24, 1945, at Art. 2(4). This duty is subject to the right of self-defence stated in Art. 51.

[308] UNHCR, *supra*, note 42, at 40.

[309] U.N.G.A. Res. 33/165, December 20, 1978.

[310] *Id.*, at paras. 2-3.

[311] In *M.A. A26851062 v. I.N.S.*, it had been held that a refugee claim based on failure to perform military service could be established if ". . . the military engages in internationally condemned acts of violence with which the asylum-seeker sincerely does not wish to be associated. . .": 858 F. 2d 210, at 216 (4th Cir. 1989); reversed *en banc* at 899 F. 2d 304 (4th Cir. 1990).

[312] Immigration Appeal Board Decision V86-4030W, March 21, 1986.

> in his country's military force because he would probably be forced to participate in violent acts of persecution against non-combatant civilians, which is contrary to recognized basic international principles of human rights.[313]

This same approach is applied in the decision of *Zacarias Osorio Cruz,*[314] in which the Mexican claimant deserted his army unit because he did not wish to continue to be involved with the summary execution of political prisoners:

> The applicant is not a refugee because he deserted, but rather because he has demonstrated that he has a well-founded fear of persecution because of his political opinions, which prevent him from taking part in a type of military action that is contrary to the most basic international rules of conduct.[315]

The third exception to the exclusion of claims based on refusal to engage in military service relates to persons who raise principled objections to such activity. As Guy Goodwin-Gill argues,

> Objectors may be motivated by reasons of conscience or convictions of a religious, ethical, moral, humanitarian, philosophical, or other nature. . . . Military service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority: it is a political act. The "law of universal application" can thus be seen as singling out or discriminating against those who hold certain political views.[316]

In contrast to a claim based on refusal to participate in military activity contrary to international law, the notion of conscientious objection to military service speaks to the predicament of individuals whose own beliefs conflict with participation in legally permissible military activities.

The right to conscientious objection is an emerging part of international human rights law, based on the notion that "[f]reedom of belief cannot be truly recognized as a basic human right if people are compelled to act in ways that absolutely contradict and violate their core beliefs".[317] Drawing on this right to freedom of thought, conscience, and religion contained in both the Universal Declaration of Human Rights[318] and the International Covenant on Civil and Political Rights,[319] the United Nations Commission on Human Rights has expressly recognized the right to conscientious objection as "a

[313] *Id.*, at 6, *per* G. Vidal.

[314] Immigration Appeal Board Decision M88-20043X, C.L.I.C. Notes 118.6, March 25, 1988.

[315] *Id.*, at 3, *per* P. Arsenault.

[316] G. Goodwin-Gill, *The Refugee in International Law*, pp. 33-34 (1983). While some writers distinguish religiously and politically motivated refusal to engage in military service, Grahl-Madsen refutes the logic of such a differentiation: 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 238 (1966).

[317] B. Frelick, "Conscientious Objectors as Refugees", in V. Hamilton, ed., *World Refugee Survey: 1986 in Review*, p. 31 (1987).

[318] UDHR, *supra*, note 71, at Art. 18.

[319] ICCPR, *supra*, note 71, at Art. 18.

legitimate exercise of the right of freedom of thought, conscience and religion", and appealed to states to provide for alternative service of a civilian and non-combatant nature.[320] This view is shared within the Council of Europe, where the right to an alternative to military service is recognized for persons who express compelling reasons of conscience against bearing arms.[321] Thus, insofar as a state fails to make provision for the accommodation of conscientious objectors, a principled claim to refugee status may be established.

Conscientious objection as an exception to the exclusion of refugee claims based on failure to perform military service was tentatively raised in Canada by the 1979 Immigration Appeal Board Decision in *Felix Salatiel Nuñez Veloso.*[322] Shortly thereafter, however, the Federal Court of Appeal issued its landmark decision of *Marek Musial v. Minister of Employment and Immigration,*[323] involving the claim of a Pole who wished to "avoid military service which [was] abhorrent to him on moral grounds",[324] because it involved "subjugating the Afghan people to communist domination".[325] The majority decision of the Court totally ignored the issue of conscientious objection:

> . . . the Board was right in assuming that a person who has violated the laws of his country by evading ordinary military service. . . cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs.[326]

In contrast, the concurring judgment of Chief Justice Thurlow left the possibility open that conscientious objection would be recognized in Canadian law:

> . . . I do not read the [Immigration Appeal Board's] reasons as meaning more than that army deserters and conscientious objectors are not, as such, within the definition. That is, as I see it, far from saying that because a person is an army deserter or a conscientious objector he cannot be a Convention refugee. . . .[327]

The majority view in *Marek Musial* enjoyed currency for some years, until questioned by a trilogy of Board decisions in 1987, commencing with the

[320] U.N. Doc. E/CN.4/1989/L.10/Add.15, March 9, 1989.

[321] Recommendation R(87)8, Committee of Ministers of the Council of Europe, April 9, 1987; *see also* Council of Europe Doc. 88.C55 (1988).

[322] "[T]he applicant. . . was forced by repeated threats to commit acts and take part in courses of action contrary to human dignity and totally opposed to her moral, religious and political convictions": Immigration Appeal Board Decision 79-1017, C.L.I.C. Notes 11.15, August 24, 1979, at 3, *per* J.-P. Houle.

[323] (1981), 38 N.R. 55 (F.C.A.); affirming Immigration Appeal Board Decision V80-6368, November 19, 1980.

[324] Immigration Appeal Board, *id.*, at 4, *per* B. Howard.

[325] Federal Court of Appeal, *id.*, at 57, *per* Thurlow C.J.

[326] *Id.*, at 60, *per* Pratte J.

[327] *Id.*, at 59, *per* Thurlow C.J.

case of Salvadoran *Luis Alberto Mena Ramirez.*[328] The claimant was a Jehovah's Witness who had resisted forced conscription on the ground that he was opposed to war and killing. There was no opportunity for Mr. Mena Ramirez to voice his conscientious objection, as a result of which he was labelled by the military as a guerilla sympathizer for refusing to join the army. In recognizing him as a Convention refugee, the Board noted:

> . . . a person with such deep seated scruples may very well have a subjective fear of persecution for no other reason than the possibility of being required to take part in military activities. It matters little that he is subjected to the same conscription laws and practices as other young men of military age who are without such scruples; the issue is not equal treatment, but fear of persecution. . . . [T]he Board finds a systematic persecution by reason of religion. It is the failure of the recruiting system to make allowances for the convictions of the conscientious objector that forms the basis of the fear. Such a failure amounts to fear of persecution within the meaning of the Act.[329]

The issue of conscientious objection was further resuscitated in the same year by *obiter* comments in *Marco Antonio Valladares Escoto,*[330] a young Honduran who claimed to be at risk of forcible conscription:

> A person is not a refugee if his *only* reason for making a claim is his dislike of military service or fear of combat. There may be instances where the objection against service is lodged in a genuine religious or moral conviction. If the Board were to find that his alleged fear of mistreatment following indiscriminate recruitment was based on a set of credible facts, the Board could find him to be a Convention refugee. . . .[331]

The culmination of this move away from the absolutist position adopted by the majority in *Marek Musial*[332] was the decision of the Board in *Basir Ahmad Ahmaddy,*[333] involving a citizen of Afghanistan who objected on principle to bearing arms in the service of the communist government of that state. At the conclusion of an extremely detailed judgment, the Board cited with approval the *concurring* judgment of Chief Justice Thurlow in *Marek Musial,*[334] and found the claimant to be a Convention refugee based on conscientious objection:

> He has a conscientious objection, both personally and due to his Islamic beliefs, to killing his brothers in a war in which he does not believe, a war which seems to be using mere children to systematically kill innocent civilians. His act of refusing to serve is one which could not be allowed to go "unpunished" by the authorities. It would be interpreted by them as an expression of political opinion contrary to their own. . . . This thereby brings him within the definition of Convention refugee as a conscientious objector. . . .[335]

[328] Immigration Appeal Board Decision V86-6161, C.L.I.C. Notes 110.15, May 5, 1987.
[329] *Id.*, at 4-5, *per* D. Anderson.
[330] Immigration Appeal Board Decision T87-9024X, July 29, 1987.
[331] *Id.*, at 5-6, *per* D. Davey.
[332] *Supra*, note 323.
[333] Immigration Appeal Board Decision T86-10392, December 1, 1987.
[334] *See* text *supra* at note 327.

This evolution is consistent with the international standards adopted in the years since the drafting of the Convention, while simultaneously respecting the internal structure of the Convention by linking conscientious objection to an implied political challenge to the legitimacy of the state.

In sum, claims which involve failure to perform military service, while not routinely within the scope of the Convention definition, may nonetheless lead to a recognition of refugee status in three circumstances. First, discrimination in the establishment or administration of a military service system may serve as a means of particularized social disfranchisement, thereby undercutting its political legitimacy, and opening the door to closer scrutiny. Second, the specific form of military service objected to may be fundamentally illegitimate, as when it contemplates violation of basic precepts of human rights law, humanitarian law, or general principles of public international law. Where the service is itself politically illegitimate, refusal to enlist or remain in service cannot be construed as a bar to refugee protection. Third, the failure to recognize the legitimacy of conscientious objection, and to provide for an appropriate and proportionate non-combatant alternative, may in and of itself constitute a sufficient threat to human rights to ground a claim to refugee status based on implied political opinion.

5.6.3 Victims of War and Violence

While the Refugee Convention was conceived as a response to the victims of war, it was not intended that all those displaced by violent conflict should enjoy refugee status:

> The text . . . obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, flood, earthquakes or volcanic eruptions, for instance, *differentiated between their victims* on the grounds of race, religion, or political opinion. Nor did the text cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities *unless* they were otherwise covered by Article 1 of the Convention. [Emphasis added][336]

This extract from the drafting history of the Convention makes clear two essential points. First, victims of war and conflict are not refugees *unless* they are subject to differential victimization based on civil or political status.[337] Second, it follows that it is incumbent on decision-makers to examine

[335] *Supra*, note 333, at 41, *per* S. Bell.
[336] Statement of Mr. Robinson of Israel, U.N. Doc. A/CONF.2/SR.22, at 6, July 16, 1951.
[337] "This [Convention] definition. . . leaves out many persons commonly thought of as refugees. For example, it does not cover most of those who flee the scene of an armed conflict, and armed conflict is a conspicuous source of many influxes that reach massive proportions": D. Martin, "Large-Scale Migrations of Asylum Seekers" (1982), 76 A.J.I.L. 598, at 607. *Accord*, e.g., D. Hull, "Displaced Persons: 'The New Refugees'" (1983), 13 Georgia J. Intl. Comp. L. 755, at 757; J. Starke, "Major Trans-Frontier 'Flows' of Refugee-Type Civilians" (1983), 57 Australian L.J. 366, at 366; R. Hofman, "Refugee-Generating Policies and the Law of State Responsibility" (1985), 45 Zeitschrift Auslandisches Offentliches 694, at 702; M. Gibney, "A 'Well-Founded Fear' of Persecution" (1988), 10(1) Human Rts. Q. 109, at 114.

the claims of persons in flight from violence in order to ascertain whether their particular circumstances disclose any evidence of a link between the harm feared and their civil or political status.[338]

Concern about the inappropriateness of this selective approach to the protection of war refugees[339] has led to the drafting of regional standards in both Africa[340] and Latin America[341] which provide for the general enfranchisement of the victims of violence. UNHCR has provided assistance to the victims of war, and it is arguable that a customary norm of providing temporary refuge to the victims of generalized violence is evolving from the practice of states.[342] Nonetheless, the Convention today remains firmly anchored in the notion of elevating only a subset of those at risk of war and violent conflict to the status of refugee.

This general proposition is well-established in Canadian law by a variety of cases involving the victims of violence in Lebanon,[343] Ethiopia,[344] and

[338] "A majority of today's refugees are victims of the military factor which although not enough in itself to satisfy eligibility criteria, plays an important complementary role in refugee flows": Z. Rizvi, "Causes of the Refugee Problem and the International Response", in A. Nash, ed., *Human Rights and the Protection of Refugees under International Law,* p. 112 (1988).

[339] "Rather early after the adoption of the 1951 Convention it became obvious that there existed groups and categories of persons who found themselves generally speaking in a similar position to that of refugees, without necessarily meeting the criteria of the general definition. In some cases these persons had left their country of origin for reasons other than those contained in the general definition, particularly war or civil war": G. Jaeger, "Status and International Protection of Refugees", in International Institute of Human Rights, ed., *Lectures Delivered at the Ninth Study Session of the International Institute of Human Rights,* p. 7 (1978). *Accord* J. Starke, *supra,* note 337, at 336: "It is obvious also that one lesson from this crisis of massive trans-frontier flows of civilians is that international refugee law needs to be overhauled, and a bridge built between it and the seemingly more generic international law of human rights."

[340] "The OAU definition is not simply wider; it is also qualitatively different. Whereas the earlier definitions contemplate situations of fear and danger created essentially by deliberate acts and policies, often of a discriminatory character and normally of the authorities of the country, the OAU definition contemplates also a state of affairs generally where the qualities of deliberateness and discrimination need [not] exist. It is generally agreed that this additional eligibility covers armed conflict situations, whether international or internal. . .": G. Coles, "Some Reflections on the Protection of Refugees from Armed Conflict Situations" (1984), 7 In Defense of the Alien 78, at 79. *See generally* Section 1.4.3, *supra.*

[341] "The 'Cartagena Declaration'. . . takes up the broadened definition of the term 'refugee' stated in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, i.e. victims of 'violence' and 'conflicts' and not merely victims of 'persecution'. . .": Note, "International Protection in Latin America" (1985), 14 Refugees 5, at 5. *See generally* Section 1.4.4, *supra.*

[342] *See* Section 1.5, *supra.*

[343] "[H]e is a refugee from a civil war, and is not a 'Convention refugee'. . .": *Zohrab Khoren Meghdessian,* Immigration Appeal Board Decision 79-1204, C.L.I.C. Notes 14.12, November 21, 1979, at 5, *per* J. Scott. *Accord Mohammed Said Sleiman,* Immigration Appeal Board Decision V79-6125, C.L.I.C. Notes 18.13, April 10, 1980, at 2, *per* C. Campbell: "[T]here is no evidence that he or any members of his family have ever suffered persecution or faced any special difficulty in that country as a result of their race, religion, nationality, membership of a particular social group, or political opinion, beyond the problems they would face in consequence of the general circumstances existing there."

[344] "[A]lthough a well-founded fear is difficult to identify in each individual case, it is different from an apprehension about facts and circumstances that would be the result of a general situation which affects people indiscriminately, for example, poor economic conditions or war": *Ismail Hassan Dembil,* Immigration Appeal Board Decision M80-1018, March 7, 1980, at 2, *per* J.-P. Houle; set aside by Federal Court of Appeal Decision A-163-80, September 30, 1980 on other grounds. *Accord Mahmoud Saddo,* Immigration Appeal Board Decision M80-1123, July 24, 1980.

Chile.[345] Moreover, as the decision in *Elias Iskandar Ishac*[346] makes clear, the mere fact that the conflict escaped is based on religion or politics is not relevant unless persons of a particular religion or political perspective are differentially at risk. In this case, the Board found the risk to be roughly equivalent for persons of all beliefs, and hence refused the claim of a citizen of Lebanon attempting to escape the civil war in that country:

> If the appellant is a refugee at all, he is a refugee from civil war in his country, and not a refugee protected by the Convention. . . . A civil war, even on religious grounds, is not persecution as contemplated by the Convention.[347]

This general rule, however, admits of two important exceptions.

First, persons may be differentially at risk where the civil war or violence is directed at a particular social subgroup. This principle derives from the decision in *Tekeste Kifletsion,*[348] in which an Eritrean from Ethiopia was determined to be a Convention refugee on the basis of the genocidal conflict directed against members of his race by the Ethiopian government:

> . . . a civil war against a minority race inside a country, verging on genocide, is without doubt evidence of racial persecution.[349]

Here, it could not truly be said that the claimant was at risk only of an undifferentiated harm affecting all members of his society, but was rather specifically at risk by reason of his race.[350] This exception was affirmed by the Board in *Adan Jeronimo Alvarenga:*[351]

> Civil war in itself does not constitute persecution as contemplated by the Con-

[345] "He said he came to Canada because he feared there might be a war between Chile and Argentina. Even if that fear was well-founded, it would not entitle him to claim refugee status under the definition of refugee because a fear of war is not persecution for any of the reasons stated in the definition": *Pedro Enrique Juarez Maldonado v. Minister of Employment and Immigration* (1979), 31 N.R. 34, at 42, *per* McKay D.J. (in dissent).

[346] Immigration Appeal Board Decision M77-1040, April 25, 1977.

[347] *Id.*, at 2, *per* J. Scott. *Accord Hassan Darwich,* Immigration Appeal Board Decision 77-3038, May 20, 1977; affirmed by the Federal Court of Appeal at (1978), 25 N.R. 462; *Elias El Chedraoui,* Immigration Appeal Board Decision M81-1296, February 10, 1982, at 2-3, *per* R. Tremblay: "The main reason given by the applicant to support his claim to refugee status are the horrors of the civil war. Although we have great sympathy for peoples who have to live in such a hell and we understand the trauma caused by such events, there is no provision in the Convention for determining that victims of internal wars between rival factions for religious reasons are refugees."

[348] Immigration Appeal Board Decision 79-1136, C.L.I.C. Notes 20.3, February 29, 1980.

[349] *Id.*, at 3, *per* R. Tremblay.

[350] *Accord Kidane Ghebreiyesus,* Immigration Appeal Board Decision 79-1137, C.L.I.C. Notes 20.3, March 21, 1980; *Isaak Afework,* Immigration Appeal Board Decision 79-1139, C.L.I.C. Notes 20.3, May 21, 1980.

[351] Immigration Appeal Board Decision M87-1081, May 20, 1987.

> vention; however, a civil war directed against a religious group in particular or a social group would be persecution within the definition in the Convention.[352]

Second, even within the context of generalized violence or war, there may exist a risk of serious harm specific to persons defined by a particular form of civil or political status. While early Canadian decisions preferred simply to adopt an absolutely dismissive view of claims derived from situations of conflict,[353] the decision of the Federal Court of Appeal in *Zahirdeen Rajudeen v. Minister of Employment and Immigration*[354] marked a watershed in the approach to this issue. This case involved a Sri Lankan Tamil whose need for protection from Sinhalese thugs had been ignored by the authorities. The Immigration Appeal Board dismissed the claim as nothing more than a reflection of the generalized violence in Sri Lanka.[355] The Federal Court, however, found that the harm faced by the claimant was in fact due to the unwillingness of authorities to protect him because of his race and religion:

> The applicant was not mistreated because of civil unrest in Sri Lanka but because he was a Tamil and a Muslim.[356]

This decision underscores the critical importance of inquiring into all of the circumstances of a claimant coming from an area which suffers from generalized violence in order to discern whether or not the risk faced by a particular individual or group is in fact rooted in civil or political status, in which case refugee status may follow.

Thus, while the general proposition is that the victims of war and violence are not by virtue of that fact alone refugees, it is nonetheless possible for persons coming from a strife-torn state to establish a claim to refugee status. This is so where the violence is not simply generalized, but is rather directed toward a group defined by civil or political status; or, if the war or conflict is non-specific in impact, where the claimant's fear can be traced to specific forms of disfranchisement within the society of origin.

[352] *Id.*, at 3, *per* G. Loiselle.

[353] *See*, e.g., *Hassan Darwich*, Immigration Appeal Board Decision 77-3038, May 20, 1977; affirmed by the Federal Court of Appeal at (1978), 25 N.R. 462, at 463, in which the Lebanese claimant had in fact been targeted as a Moslem sympathizer, and was thus more particularly at risk; and *Muhieddine Abdul Wahab Jomaa*, Immigration Appeal Board Decision T79-9032, C.L.I.C. Notes 7.17, May 8, 1979, where the Lebanese claimant was acutely at risk by reason of his political neutrality. Both claims were dismissed as reflecting simply the risk associated with generalized violence.

[354] (1985), 55 N.R. 129 (F.C.A.).

[355] "Whether events in Sri Lanka can be classed as 'civil war' or not, there is certainly civil unrest, but the nature of that unrest and the resulting harassment of Mr. Rajudeen is not such that he can be classed as a Convention refugee": Immigration Appeal Board Decision V83-6091, C.L.I.C. Notes 57.10, July 20, 1983, at 4, *per* B. Howard.

[356] *Supra*, note 354, at 134, *per* Heald J.

6

Cessation and Exclusion

The Convention conceives of refugee status as a transitory phenomenon, which expires when a refugee can either reclaim the protection of her own state or has secured an alternative form of enduring protection.[1] Because refugee law is intended simply to afford surrogate protection pending the resumption or establishment of meaningful national protection, the Convention explicitly defines the various situations in which the cessation of refugee status is warranted.[2]

Similarly, refugee status was not envisaged as the entitlement of every person genuinely at risk of persecution. Serious criminals[3] and persons whose actions have exhibited flagrant disregard for the purposes of the United Nations[4] may face the possibility of persecution in their state of origin, but they are outside the scope of the refugee definition. The Convention's exclusion clauses[5] are framed so as to bar persons who pose a critical risk to the receiving state, or whose own breach of fundamental standards of humane conduct renders them unworthy of protection.

Issues of cessation of and exclusion from refugee status may arise in two contexts. First, since the incorporation into Canadian law in 1989 of Arti-

[1] "It is the return of refugees to their own community or their integration in a new one which constitutes a permanent or durable solution. . . . [I]nternational protection is of an essentially temporary nature and is the sum of all action which seeks to achieve the admission of a refugee into, and his secure stay in, a country where he or she is not in danger of *refoulement* and can enjoy basic rights and humane treatment until the above objective is achieved — that of renewed belonging in a community": Executive Committee of the High Commissioner's Programme, "Note on International Protection", U.N. Doc. A/AC.96/680, July 15, 1986, at 3.

[2] *Convention relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force April 22, 1954 ("*Convention*"), at Art. 1(C). While Arts. 1(D) and 1(E) of the *Convention* are phrased in the language of exclusion, substantively they speak to the fact of surrogate protection and are thus more appropriately comparable to Art. 1(C)(3) than to the primary exclusion clause, Art. 1(F). "It is generally agreed that the enumeration of cessation clauses in Article 1C of the Refugee Convention. . . is exhaustive. In other words, once a person has become a refugee as defined in Article 1 of the Convention. . . he continues to be a refugee until he falls under any of those cessation clauses": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 369 (1966).

[3] *Convention, supra,* note 2, at Art. 1(F)(a)-(b).

[4] *Id.*, at Art. 1(F)(c).

[5] Arts. 1(D) and (E) are treated herein as substantively analogous to cessation clauses: *see* note 2, *supra*.